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United States of America

PHILIPPINE ISLANDS

In the Supreme Court of the Philippine Islands

COMPANIA GENERAL DE TABACOS DE FILIPINAS,
Plaintiff-Appellee,
VERSUS
COLLECTOR OF INTERNAL REVENUE,
Defendant-Appellant.

G. R. No. 27766

(Appellate Jurisdiction)

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

Be it remembered that on the dates respectively mentioned the following proceedings were had in the above-entitled case:

On October 17, 1925, the plaintiff, by its attorneys, filed in the Court of First Instance of the City of Manila,

a complaint against the defendant which reads as follows:

[CAPTION OMITTED]

COMPLAINT

Plaintiff alleges:

I

That it is a corporation duly organized and existing under the laws of the Kingdom of Spain, duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila.

II

That the defendant is the duly appointed, qualified, and acting Collector of Internal Revenue for the Philippine Islands.

III

That during the year 1922 plaintiff exported from the Philippine Islands and sold in the United States of America certain quantities of centrifugal sugar, at a profit to it of P114,226.80 and certain quantities of manufactured tobacco at a profit to it of P296,341.19, a total profit to plaintiff of P410,567.99, Philippine currency.

IV

That the defendant, Collector of Internal Revenue, acting and pretending to act under the provi-

sions of Act 2833, as amended by Act 2926 (Philippine Income Tax Law), unlawfully and illegally did levy and assess against plaintiff a tax of three per centum on the amount of the aforesaid profits earned by plaintiff upon the merchandise exported and sold by it in the United States of America during the year 1922, as alleged in Paragraph III hereof, in the sum of P12,009.75, Philippine currency.

V

That on the 18th day of October, 1923, plaintiff, in order to avoid the infliction upon it of severe fines and penalties and the distraint of its property by defendant, did pay to defendant, under instant protest in writing, the said sum of P12,009.75, Philippine currency.

VI

That plaintiff's protest against the aforesaid tax was based upon the grounds:

(a) That the profit obtained by plaintiff, from the sugar and tobacco sold by it in the United States of America during the year 1922, as aforesaid, was subject to the income tax levied by the Federal Government of the United States, under the United States Revenue Act of 1921, only, as profits derived from sources within the United States by foreign corporations; and

(b) That no part of the profit obtained by plaintiff, from the sugar and tobacco sold by it in the United States of America during the year 1922,

as aforesaid, was derived from sources within the Philippine Islands.

VII

That plaintiff's protest against the payment of the aforesaid tax was overruled and denied by defendant on the 20th day of October, 1923, and defendant has refused, and still continues in his refusal, to return to plaintiff, on demand, the said sum of ₱12,009.75, Philippine currency, or any part thereof.

Wherefore, plaintiff prays judgment against defendant for the sum of ₱12,009.75, Philippine currency, and costs.

Manila, P. I., October 17, 1925.

FISHER, DEWITT, PERKINS & BRADY,
BY: JOHN R. MCFIE, JR.
Attorneys for Plaintiff.

On November 18, 1925, the defendant Collector of Internal Revenue filed an answer to the foregoing complaint as follows:

[CAPTION OMITTED]

ANSWER

Now comes the defendant in the above-entitled case and through his undersigned attorney to this court respectfully states:

I

That he denies each and every allegation contained in each and every paragraph of the plaintiff's complaint except what is specifically admitted herein.

II

That he admits the allegations contained in Paragraphs I, II, III, and V of plaintiff's complaint except that the amount upon which the income tax assessed and collected from the plaintiff is not on the total of those profits stated in Paragraph III of the complaint, namely, the ₱114,226.80 and the ₱296,341.19, but upon the total of these two amounts minus ₱10,243.14, representing losses sustained by the plaintiff in certain quantities of oil and copra exported from the Philippine Islands and sold in the United States during the year 1922.

III

That the taxes mentioned in the plaintiff's complaint and sought to be recovered by it in this case were lawfully and legally levied, assessed, and collected under provisions of Act 2833, as amended by Act 2926.

IV

Wherefore, the defendant prays the court to render judgment that plaintiff take nothing by its

complaint, with costs of this action against plaintiff.

Manila, November 16, 1925.

DELFIN JARANILLA
Attorney-General.

On January 22, 1926, the plaintiff filed the following amended complaint:

[CAPTION OMITTED]

AMENDED COMPLAINT

Plaintiff alleges:

I

That it is a corporation duly organized and existing under the laws of the Kingdom of Spain, duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila.

II

That the defendant is the duly appointed, qualified, and acting Collector of Internal Revenue for the Philippine Islands.

III

That during the year 1922 plaintiff exported from the Philippine Islands and sold in the United

States of America certain quantities of centrifugal sugar, manufactured tobacco, copra, and coconut oil, at a net profit to plaintiff of ₱400,324.85, Philippine currency.

IV

That the defendant, Collector of Internal Revenue, acting and pretending to act under the provisions of Act 2833, as amended by Act 2926 (Philippine Income Tax Law), unlawfully and illegally did levy and assess against plaintiff a tax of three per centum on the amount of the aforesaid net profits earned by plaitiff upon the merchandise exported and sold by it in the United States of America during the year 1922, as alleged in paragraph III hereof, in the sum of ₱12,009.75, Philippine currency.

V

That on the 18th day of October, 1923, plaintiff, in order to avoid the infliction upon it of severe fines and penalties and the distraint of its property by defendant, did pay to defendant, under instant protest in writing, the said sum of ₱12,009.75, Philippine currency.

VI

That plaintiff's protest against the payment of the aforesaid tax was overruled and denied by defendant on the 20th day of October, 1923, and defendant has refused and still continues in his refusal, to return to plantiff, on demand the said sum of

P12,009.75, Philippine currency, or any part thereof.

Wherefore, plaintiff prays judgment against defendant for the return to it of the sum of P12,009.75, Philippine currency, and costs.

Manila, P. I., January 22, 1926.

FISHER, DEWITT, PERKINS & BRADY,
By: JOHN R. MCFIE, JR.,
Attorneys for Plaintiff,
601 Pacific Building, Manila.

On June 12, 1926, the plaintiff and the defendant filed the following agreed statement of facts:

[CAPTION OMITTED]

AGREED STATEMENT OF FACTS

Come now the parties, plaintiff and defendant, in the above-entitled cause, by their undersigned attorneys, and respectfully submit to this Honorable Court the following statement of facts, which the court may find as true and enter judgment thereon:

I

That plaintiff is a corporation duly organized and existing under the laws of the Kingdom of Spain duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila.

II

That defendant is the duly appointed, qualified, and acting Collector of Internal Revenue for the Philippine Islands.

III

That plaintiff is the owner of several "haciendas," sugar and oil mills and tobacco factories located in the Philippine Islands destined to the production or manufacture of tobacco, sugar, copra, and coconut oil for sale therein and in foreign countries; and has been and is still engaged, in the Philippine Islands, in the shipping business and in the buying and selling of tobacco, sugar, copra, and oil and in the exportation of the same, and that its business has been, and is being done mainly in the Philppine Islands.

IV

That the Philippine branch of the plaintiff corporartion on various dates during the year 1922 exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of P114,226.80, Philippine currency.

V

That, likewise, the plaintiff's Philippine branch on various dates during said year 1922, exported from the Philippine Islands a certain quantity of manufactured tobacco produced by it in the Philippine Islands which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, deriving from such transactions a profit of ₱296,341.19, Philippine currency.

VI

That, likewise, the plaintiff's Philippine branch on various dates during the said year 1922, exported from the Philippine Islands a certain quantity of copra and a certain quantity of coconut oil, produced, purchased, or manufactured by it in the Philippine Islands, which were sold in the United States by the agency therein of the plaintiff's Philippine branch, such sales being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, and that from such transactions on copra and coconut oil the plaintiff suffered losses amounting to ₱10,243.14, Philippine currency.

VII

That deducting the sum of ₱10,243.14, the losses mentioned in Paragraph VI of this stipulation

from the sum of ₱410,567.99, the aggregate of the profits mentioned in Paragraphs IV and V, there remained a net profit of ₱400,324.85.

VIII

That the said net profit of ₱400,324.85, together with other gains, profits, or income were accounted for by the plaintiff on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, thereby subjecting such profits, gains, or incomes to further business deductions—management expenses, losses, etc.

IX

That the defendant Collector of Internal Revenue, acting and pretending to act under the provisions of Act 2833 (Philippine Income Tax Law), as amended by Act 2926, levied and assessed against plaintiff a tax of three (3) per centum on the amount of the aforesaid net profits (₱400,324.85) earned by plaintiff, as recited in Paragraphs IV, V and VI thereof, in the sum of ₱12,009.75, Philippine currency.

X

That on the 18th day of October, 1923, plaintiff, in order to avoid the infliction upon it of fines and penalties and the distraint of its property by defendant, did pay to defendant, under instant protest in writing, the said sum of ₱12,009.75, Philippine currency.

XI

That plaintiff's protest against the payment of the aforesaid tax was overruled and denied by defendant on the 20th day of October, 1923, and defendant has refused, and still continues in his refusal, to return to plaintiff, on demand, the said sum of ₱12,009.75, Philippine currency, or any part thereof.

XII

That the parties hereto reserve the right to introduce evidence, direct or rebuttal, on any point not herein stipulated and which may be deemed material and necessary for the proper determination of this case.

Manila, P. I., June 12, 1926.

Respectfully submitted,

FISHER, DEWITT, PERKINS & BRADY,
By: WILLIAM C. BRADY,
Attorneys for Plaintiff.
DELFIN JARANILLA,
Attorney-General,
Attorney for Defendant.

On November 16, 1926, the Court of First Instance of the City of Manila rendered its decision as follows:

[CAPTION OMITTED]

DECISION

According to the agreed statement of facts attached to the record, the Compañía General de Tabacos de Filipinas, which is a corporation duly organized under the laws of the Kingdom of Spain, with license to do business in these Islands, having its principal office in this City of Manila, being the owner of several sugar estates, oil mills and tobacco factories situated in these Islands and devoted to the production and manufacture of tobacco, sugar, copra and coconut oil to be sold here and abroad, exported in the year 1922 from these Islands a certain amount of centrifugal sugar of which ten per cent was produced and ninety per cent bought in these Islands but sold in the United States through the agency of the branch of the plaintiff corporation, which sale was made with the approval of the branch in these Islands as regards the price and other terms and conditions thereof, and produced a gain of ₱114,226.80, Philippine currency.

That in the same year, but on different dates, said corporation exported a certain amount of tobacco manufactured and produced by itself in these Islands to the United States where it was sold by the agency of the branch obtaining a profit of ₱296,241.19.

In the same year, the same corporation exported to the United States certain amount of copra and oil, which was sold in the same manner and conditions, causing a loss of ₱10,243.14, instead of gain, which loss reduced the total amount of the two gains above mentioned to a net profit of ₱400,324.85, upon which the defendant Collector of Internal Revenue, under the provisions of Act No. 2833, concerning internal revenue taxes, as amended by Act No. 2926, collected from the plaintiff corporation as three per cent tax upon the amount last mentioned, the sum of ₱12,009.75, which the plaintiff corporation, found it necessary to pay, although it did not consider itself bound to do so, under protest, in order to avoid the imposition of the fines and other penalties prescribed by the law.

The refund of said amount is claimed in the complaint that initiated this action.

The only question to be decided is, in view of the facts drawn from the agreed statement of facts, a legal one, and that is whether or not under section 10 of the Act first cited, as amended by section 7 of Act No. 2926, the plaintiff corporation is bound to pay the tax collected from it.

Said section 10, in providing the collection of a tax of three per cent upon the total amount of the net income received during the preceding civil year by every corporation, joint stock company, partnership, joint account association, insurance company organized, authorized or existing under the laws of any foreign country, determines the source from

which it must come and the place within which it must exist, and that place, according to said section, is the Philippine Islands.

Counsel for defendant, in interpreting the words used by the law, to wit, "sources within the Philippine Islands," states that the income or benefit of the plaintiff corporation upon which the defendant has collected the three per cent tax, *was obtained from articles which were produced, manufactured or purchased in the Philippine Islands*, and the sale of which, while it took place in the United States, has been subject to the confirmation and absolute control of the branch of the plaintiff corporation in these Islands and that the profits realized were credited on the books of account of the said branch; and he concludes that, this being the case, the income or profit above mentioned was an income obtained from sources within the Philippine Islands.

The court is of the opinion that the interpretation is not correct. While the goods and merchandise mentioned in the agreed statement of facts are considered as sources of income, because it is from them, once sold, exchanged or assigned in payment of a debt, that the incomes proceed, yet said source must be considered remote for the purposes of the assessment of the tax provided in the section of said law which virtually makes a distinction, according as the merchandise has been sold in these Islands, or outside thereof.

If the merchandise were sold within these Islands, the foreign corporation, owner of the same,

is of course subject to the payment of the tax demanded of it, because the receipt or income was obtained from a sale made in this city. But if it is sold, as is the case here, in the United States, the three per cent tax cannot be levied upon the income obtained, in the opinion of the court.

The true source of the income received by the plaintiff corporation, for the purposes of the application of the law, is not the merchandise itself, but the transaction made concerning it, because so long as the merchandise is not placed on the market and remains stored or deposited in these Islands, they cannot mean any real income, nor net income subject to tax. A private merchant or a corporation and other individuals pertaining to other professions pay the income tax when the same has been obtained as income from the sale of any merchandise, or the practice of a particular profession, or any other kind of activity.

If the goods mentioned, although produced in these Islands, could not have been coverted into cash or receipts representing income but after they are sold in the United States, the income that must be subject to tax, according to said law, was derived from sources which are not within the Philippine Islands, but in the United States, because said sources are not the goods produced here, but the sale thereof made in America.

This is the genuine meaning of the section of the law in question, because if it were as maintained by counsel for the defendant, the words used by the

law "sources within the Philippine Islands" would be of no use, for the simple reason that if they are to be held to mean goods produced or manufactured in the United States and sold in that continent, it is clear that the merchant or corporation owner and seller thereof is not bound to pay in these Islands any tax upon the income obtained.

It is, therefore, evident that in using the words above italicized, the law means a transaction effected here, and not in the United States, of articles produced or manufactured here or in foreign countries, but purchased and brought here and resold in these Islands. If they are sold in the United States, although they are goods produced and manufactured here, as in the case before us, the receipts obtained from the transactions or sales effected outside of these Islands cannot be subject to the three per cent tax on income.

Such is the spirit of the law, the purpose of which must be the encouragement of mercantile spirit and initiative, not only among the natives, but also among the foreigners, because it constitutes one of the true sources of wealth and agrandizement of this country, to the welfare and happiness of whose inhabitants, every sound and wise legislation must tend. To place the merchants, whether natives or foreigners, who are cooperating towards the material development of the Philippine country, in a situation to pay double income tax, one in these Islands and another in those points where the national products are sold, is not to encourage commerce, nor to work for the benefit of the taxpaying people.

The Collector of Internal Revenue is sentenced to refund to the Compañía General de Tabacos de Filipinas the sum of ₱12,009.75, without special finding as to costs.

Manila, November 16, 1926.

S. DEL ROSARIO
Judge.

On December 15, 1926, the defendant filed the following:

[CAPTION OMITTED]

EXCEPTION AND MOTION FOR NEW TRIAL

Now comes the defendant, by his undersigned attorney, and excepts to the decision rendered in the above-entitled case on November 16, 1926, of which decision, the undersigned was notified on November 22, 1926, and moves this court to set aside the judgment rendered therein and grant a new trial of said action for the following reasons:

1. That the evidence presented does not justify the decision.

2. That the decision is contrary to law.

Manila, December 15, 1926.

DELFIN JARANILLA,
Attorney-General,
Attorney for Defendant.

On December 31, 1926, the Court of First Instance entered an order denying the foregoing motion for new trial filed by the defendant, and on January 17, 1927, the defendant filed the corresponding exception thereto and announced his intention to appeal to the Supreme Court by bill of exceptions.

On January 27, 1927, and within the time limited by law, the defendant filed in the Court of First Instance his bill of exceptions, requesting that it be approved, and transmitted to the Supreme Court of the Philippine Islands together with all the evidence presented, oral or documentary.

On April 2, 1927, the Court of First Instance approved, signed and certified the said bill of exceptions, and the same was, on April 27, 1927, transmitted to the Supreme Court of the Philippine Islands for the purposes of the appeal.

On April 30, 1927, the bill of exceptions was docketed on appeal without fees, the case being duly registered on appeal under No. 27766 of the docket of the Supreme Court of the Philippine Islands.

On May 25, 1927, the bill of exceptions was printed and filed.

On July 15, 1927, the defendant and appellant Collector of Internal Revenue filed his brief in the case, assigning the following errors:

[CAPTION OMITTED]

ASSIGNMENT OF ERRORS

I

The lower court erred in declaring that the plaintiff's income taxed by the defendant was re-

ceived from sources not within the Philippine Islands and therefore not subject to taxation.

II

The lower court erred in condemning the defendant to return to the plaintiff the sum of ₱12,009.75, amount of the tax in question, instead of dismissing the complaint.

III

The lower court erred in not granting a new trial.

On September 8, 1927, the plaintiff and appellee, Compañía General de Tabacos de Filipinas, filed its brief in the case.

On September 27, 1927, the case was submitted to the Supreme court for decision on the merits.

On December 6, 1927, the Supreme Court rendered its decision in the case, in the words and figures following, to-wit:

[CAPTION OMITTED]

DECISION

STATEMENT

Plaintiff is a corporation organized and existing under the laws of the Kingdom of Spain, duly licensed to transact business in the Philippine Islands, with its principal office in the City of Manila. The defendant is the Collector of Internal Revenue.

Plaintiff alleges that during the year 1922 it exported from the Philippine Islands and sold in the United States certain quantities of centrifugal sugar, manufactured tobacco, copra and coconut oil, at a net profit of ₱400,324.85. That the defendant, acting and pretending to act under the provisions of Act No. 2833, as amended by Act No. 2926, unlawfully and illegaly levied and assessed against the plaintiff a tax of three per centum on the amount of such profit during the year 1922 amounting to ₱12,009.75, which plaintiff paid under written protest on the ground that the profit which it obtained from the sugar and tobacco sold by it in the United States was subject to the income tax levied by the government of that country. That no part of plaintiff's profit was derived from sources within the Philippine Islands. That plaintiff's protest was overruled and denied, and defendant has refused to return the amount of such tax. Wherefore, it prays for a corresponding judgment, with costs.

For answer the defendant made a general and specific denial of all of the material allegations of the complaint, except that which is specifically admitted. Defendant admits paragraphs 1, 2, 3, and 5 of plaintiff's complaint, except as to the amounts, and alleges that the taxes which plaintiff seeks to recover were lawfully levied, assessed and collected under the provisions of Act No. 2833, as amended by Act No. 2926, and defendant prays that plaintiff's complaint be dismissed, with costs.

The case was tried and submitted upon the following "Agreed Statement of Facts":

"I

"That plaintiff is a corporation duly organized and existing under the laws of the Kingdom of Spain, duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila.

"II

"That defendant is the duly appinted, qualified, and acting Collector of Internal Revenue for the Philippine Islands.

"III

"That plaintiff is the owner of several 'haciendas', sugar and oil mills and tobacco factories located in the Philippine Islands destined to the production or manufacture of tobacco, sugar, copra, and coconut oil for sale therein and in foreign countries; and has been and is still engaged, in the Philippine Islands, in the shipping business and in the buying and selling of tobacco, sugar, copra, and oil and in the exportation of the same, and that its business has been, and is being done mainly in the Philippine Islands.

"IV

"That the Philippine branch of the plaintiff corporation on various dates during the year 1922

exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of ₱114,226.80, Philippine currency.

"V

"That, likewise, the plaintiff's Philippine branch on various dates during said year 1922, exported from the Philippine Islands a certain quantity of manufactured tobacco produced by it in the Philippine Islands, which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, deriving from such transactions a profit of ₱296,341.19, Philippine currency.

"VI

"That, likewise, the plaintiff's Philippine branch on various dates during the said year 1922, exported from the Philippine Islands a certain quantity of copra and a certain quantity of coconut

oil, produced, purchased, or manufactured by it in the Philippine Islands, which were sold in the United States, by the agency therein of the plaintiff's Philippine branch, such sales being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, and that from such transactions on copra and coconut oil the plaintiff suffered losses amounting to P10,243.14, Philippine currency.

"VII

"That deducting the sum of P10,243.14, the losses mentioned in paragraph VI of this stipulation, from the sum of P410,567.99, the aggregate of the profits mentioned in Paragraphs IV and V, there remained a net profit of P400,324.85.

"VIII

"That the said net profit of P400,324.85, together with other gains, profits, or income were accounted for by the plaintiff on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, thereby subjecting such profits, gains, or incomes to further business deductions—management expenses, losses, etc.

"IX

"That the defendant Collector of Internal Revenue, acting and pretending to act under the pro-

visions of Act 2833 (Philippine Income Tax Law), as amended by Act 2926, levied and assessed against plaintif a tax of three (3) per centum on the amount of the aforesaid net profits (₱400,324.85) earned by plaintiff, as recited in Paragraps IV, V, and VI hereof, in the sum of ₱12,009.75, Philippine currency.

"X

"That on the 18th day of October, 1923, plaintiff, in order to avoid the infliction upon it of fines and penalties and the distraint of its property by defendant, did pay to defendant, under instant protest in writing, the said sum of ₱12,009.75, Philippine currency.

"XI

"That plaintiff's protest against the payment of the aforesaid tax was overruled and denied by defendant on the 20th day of October, 1923, and defendant has refused, and still continues in his refusal, to return to plaintiff, on demand, the said sum of ₱12,009.75, Philippine currency, or any part thereof.

"XII

"That the parties hereto reserve the right to introduce evidence, direct or rebuttal, on any point not herein stipulated and which may be deemed material and necessary, for the proper determination of this case."

Upon such issues and stipulated facts, the

lower court rendered judgment for the plaintiff as prayed for in its complaint, without costs, to which the defendant duly excepted and filed a motion for a new trial, which was overruled. On appeal the defendant assigns the following errors:

"I

"The lower court erred in declaring that the plaintiff's income taxed by the defendant was received from sources not within the Philippine Islands and therefore not subject to taxation.

"II

"The lower court erred in condemning the defendant to return to the plaintiff the sum of ₱12,009.75, amount of the tax in question, instead of dismissing the complaint.

"III

"The lower court erred in not granting a new trial."

JOHNS, *J.*:

Upon the stipulation of facts, the question involved of this appeal is the legal construction to be placed on Section 10 of Act No. 2833, as amended by Section 7 of Act No. 2926, which provides as follows:

"There shall be levied, assessed, collected, and paid anually upon the total net income received in

the preceding calendar year from all sources by every corporation, joint-stock company, partnership, joint-account (cuenta en participación), association, or insurance company, organized in the Philippine Islands, no matter how created or organized, but not including duly registered general copartnerships (compañías colectivas), a tax of three per centum upon such income received in the preceding calendar year assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources within the Philippine Islands by every corporation, joint-stock company, partnership, joint-account (cuenta en participación), association, or insurance company, organized, authorized, or existing under the laws of any foreign country, including interest on bonds, notes, or other interest bearing obligations of residents, corporate or otherwise, and including the income derived from dividends or net profits subject to the tax established in this subsection."

In its final analysis, that question involves the legal meaning and construction to be placed on the words "sources within the Philippine Islands," as they are used in that section, in connection with, and founded upon, the stipulation of facts. It will be noted that the section above quoted has two separate and distinct provisions; one for a tax of three per centum for each calendar year on the annual total net income derived from all sources by a domestic corporation, and the other for a like tax "upon the tatal net income received in the preceding calendar

year from all sources within the Philippine Islands" by any corporation organized and "existing under the laws of any foreign country."

It is very apparent that it was the purpose and intent of the Legislature that a foreign corporation which has a branch office in the Philippine Islands and engaged in business here should pay the same amount of income tax on that business as a domestic corporation would have to pay; otherwise, a foreign corporation with a branch office in the Philippines and doing business here would have an advantage of the amount of such annual income tax over a domestic corporation engaged in the same line of business.

Under paragraph 4 of the agreed statement of facts, it is stipulated that during the year 1922, plaintiff exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by and through the agent of the plaintiff's Philippine branch, and that the sale was subject to confirmation and absolute control as to price and other terms and conditions by the plaintiff's Philippine branch. The same stipulation is made as to the tobacco, copra and coconut oil mentioned and described in the complaint. It is further stipulated that the profits or incomes in question were accounted for by the plaintiff on its books of account "kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, etc." That is to

say, that although the sales of the products from which the incomes in question were derived were made in the United States, they were made there by an agent of the Philippine branch of the plaintiff, and all of them were made subject to the confirmation and absolute control as to price, terms and conditions by the plaintiff's Philippine branch. In other words, no sale was actually consummated until after it was ratified and approved by the local branch, and all profits or incomes from such sales were accounted for by the plaintiff on its books kept in the Philippine Islands "as earnings made by and accruing to the Philippine branch." It is further stipulated that the sugar, tobacco, copra and coconut oil in question, from which the net incomes were derived, were exclusively the products of the Philippine Islands in which and where they were produced on the properties of the plaintiff or by it purchased at or through its branch office in the Philippines, and from which country they were shipped to the United States and there sold in the same form and condition as when they were shipped from the Philippine Islands. That is to say, the income in question was derived and received by the plaintiff from the exclusive products of the Philippine Islands which were purchased or produced by and through its branch office in the Philippine Islands and which it shipped from the Islands to the United States, where such products were sold in the identical condition in which they were shipped from the Philippine Islands. Hence, it must follow that the net income of the plaintiff as to such products was

from "sources within the Philippine Islands" where the products were purchased or produced and where the plaintiff maintains its branch office for that specific purpose.

The appellee cites and relies upon the following opinion of the Attorney-General of the United States:

"A corporation organized under the laws of Scotland owns and operates two sawmills in the United States. The mills saw logs into plank squares called 'handle blanks' and also roughly turn hammer handles. These products are exported to Glasgow where they are finished at the home mill. In addition the manager of the American plant buys logs in the United States and exports them as such to Great Britain. No part of the products of the mills located in this country or of the logs purchased here is sold in the United States, but the entire output is sold in Great Britain. The plants and operations of the manager in the United States are conducted solely from fund sent to this country from the home office in Glasgow, Scotland, and no funds are sent to the home office from the American plants."

Based upon such facts, the Attorney-General held that the Scotland corporation was not liable to the tax in question. Assuming that to be the law, there is a very marked distinction between the facts in that case and the stipulated facts in this case. There the two sawmills in the United States sawed logs into plank squares called "handle blanks" and

also "roughly turn hammer handles." In that condition, they were shipped to Glasgow where "they were there finished at the home mill" and then placed on the market. It further appears that all of the operations in the United States "are conducted solely from funds sent to this country from the home office in Glasgow, Scotland, and no funds are sent to the home office from the American plants." In the instant case, it is stipulated that the plaintiff exported the products in question from the Philippine Islands to the United States where they were sold by an agency of the plaintiff's Philippine branch, and that such sale was "subject to confirmation and absolute control as to price and other terms and conditions thereof by the plaintiff's Philippine branch", and that all of such net profits were kept and accounted for by the plaintiff "on its books of account kept in the Philippine Islands as earnings made by and accruing to the Philippine branch." That opinion is not in point upon the stipulated facts in this case.

Appellee's contention if sustained would give a preference to a foreign corporation doing business through a branch office in the Philippine Islands over a domestic corporation engaged in the same line of business to the amount of the 3% tax upon the income in question. That was not the purpose and intent of the Legislature. It is very apparent that the Legislature intended that a foreign corporation with a branch office in the Philippine Islands could do business here upon the same terms and con-

ditions as a domestic corporation, and that it never intended that a foreign corporation with a branch office and doing business in the Philippines should have any preference over a domestic corporation engaged in the same line of business.

In the instant case, the record is conclusive that all of the sources of plaintiff's income in question had their origin in or were derived from its branch office in the Philippine Islands by and through the products of the Philippine Islands, which were purchased or produced by its branch office in the Philippine Islands, and that all of the sales in question were made through its branch office, and that no sale was actually consummated until such time as it was approved by the branch office both as to terms and conditions, and that an account of all of such sales made in the United States was rendered to the branch office, together with the proceeds, where a full and complete record was kept and made of all of such transactions.

Plaintiff's source of income in question was from the products of the Philippine Islands which were derived through its branch office, and it appears from the stipulation of facts that all of such products when shipped by the branch office to the United States were there sold in the identical condition in which they were shipped from the Philippine Islands, and that an account of all of such sales was rendered to the branch office.

Upon the record, we are clearly of the opinion that upon the products in question, plaintiff's net

income was derived from "sources within the Philippine Islands."

The judgment of the lower court is reversed and the complaint dismissed, with costs for the defendant.

Ten days after the publication of this decision final judgment will be entered, and five days thereafter the record will be remanded to the court below.

It is so ordered.

(SGD.) CHARLES A. JOHNS

WE CONCUR—

(SGD.) RAMON AVANCENA
" THOS. A. STREET
" GEO A. MALCOM
" IGNACIO VILLAMOR
" JAMES A. OSTRAND
ANTONIO VILLA-REAL

JOHNSON, J.; RESERVED HIS VOTE.

On December 20, 1927, the plaintiff and appellee filed the following:

[CAPTION OMITTED]

MOTION FOR REHEARING

Come now the undersigned attorneys in representation of the plaintiff and appellee Compañia General de Tabacos de Filipinas and respectfully

move this Honorable Court to grant a rehearing in the above-entitled case, for the following reasons, to wit:

That the question involved is of public concern, affecting, as it does, the revenue of the Philippine government and the income of all mercantile and trading foreign corporations with branch offices in the Islands engaged in selling products of said Islands abroad.

That this Honorable Court has decided the case upon the theory that a foreign corporation with a branch office in the Philippines and doing business here would have an advantage of the amount of such annual income tax over a domestic corporation engaged in the same line of business. Thus the decision reads:

"It is very apparent that it was the purpose and intent of the Legislature that a foreign corporation which has a branch office in the Philippines and engaged in business here should pay the same amount of income tax on that business as a domestic corporation would have to pay; otherwise, a foreign corporation with a branch office in the Philippines and doing business here would have an advantage of the amount of such annual income tax over a domestic corporation engaged in the same line of business."

That while this theory at first glance seems reasonable and fair it is fundamentally erroneous and is at variance with and repugnant to the whole scheme of the income tax law, for foreign corpora-

tions and domestic corporations are not on the same footing for taxation purposes.

That the allowable deductions to foreign corporations are different from the allowable deductions to domestic corporations, and the law makes no distinction between a foreign corporation without a branch in the Islands and a foreign corporation with a branch in the Philippine Islands.

That foreign corporations are taxed only upon so much of their income as they receive from "all sources within the Philippine Islands", consequently their allowable deductions are correspondingly restricted.—Black—Income and other Fed. Taxes, p. 243.

That as a domestic corporation pays a tax upon the total net income received from all sources it may, in ascertaining its net income, deduct from the gross amount of its income all the ordinary and necessary expenses paid within the year in the maintenance of its business and properties, including rentals, pertaining to its agency in the United States.

That no such an allowance is permitted to a foreign corporation with a branch in the Philippine Islands, as in the case of a corporation *organized under the laws of a foreign country* the deduction is limited to expenses in connection with *its business and property*, including rentals for such property *within the Philippine Islands*. Sec. 12 (a) First; Sec. 12 (b) First.

That a domestic corporation is allowed a deduction for all losses actually sustained and charged off within the year, not compensated by insurance

or otherwise, while a corporation organized under the laws of a foreign country may only deduct losses as arise in connection with the business or trade conducted by it *within the Philippine Islands*, and *not* in connection with *business, or trade conducted by it* in the United States or elsewhere.

That a domestic corporation may deduct taxes paid within the year imposed by *any foreign government*. On the other hand, if in the case at bar the goods had been sold in England through plaintiff's agency there, taxes paid to the British government would not be allowable as a deduction, as no such deduction is permitted foreign corporations. Sec. 12 (a) Fourth; Sec. 12 (b) Fourth.

That it will thus be seen, if there is any question of "advantage", by the terms of this Honorable Courts's decision, a domestic corporation would have an advantage over a foreign corporation with a branch office in the Philippines and doing business here, to the extent of the differences allowed in favor of domestic corporations as against foreign corporations in the matter of allowable deductions.

That in the case of Kidd v. Alabama, 188 U. S. 730, at page 732, Mr. Justice Holmes said: "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and, a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided."

That this is why the 1916 Revenue Act (from which our statute has been copied) emphasizes the

source of income as the test of taxability, and this has been considered a long step in advance towards international comity in taxation. Holmes Fed. Taxes—Sixth Edition, page 398.

That the decision of this Honorable Court permits the very thing which it was the object of the law to avoid, to wit, double taxation, for although taxes paid to the United States government are allowable as a deduction, no such deduction is allowed when the taxes are paid elsewhere.

That when this Honorable Court says that a foreign corporation which has a branch office in the Philippines and engaged in business here should pay the same amount *of income tax on that business* as a domestic corporation would have to pay, this Honorable Court overlooks the fact that it is the receipt of income from "sources within the Philippine Islands" rather than *the doing of business within the Philippine Islands*, which is the test of taxability of foreign corporations. In other words, the law imposes an income tax, not an excise tax, on corporations, and there is no tax on the business. For instance, the Revenue Law of 1909 of the United States was an excise tax law, both with respect to domestic and foreign corporations, unassured with reference to net income.—Flint v. Stone—Tracy Co., 220., U. S. 107; Bryant & May Ltd. v. Scott, 226 Fed. 875; cited in Holmes Federal Taxes, Sixth Edition, p. 441.

That as the income derived from the transactions described in the instant case is taxable in the United States under the decisions and rulings of the

Treasury Department as being "income from sources within the United States" (32 Opinion, Atty. General of the United States 336; 5 Treasury Bulletin 1-39-519; Holmes Fed. Taxes 1923 Edition, p. 82; Holmes Fed. Taxes Sixth Edition; 34 Opinion, Atty. General of the United States 93), such income should not be considered in this jurisdiction as "income from sources within the Philippine Islands."

That the theory upon which this case has been decided, to use the language quoted by a distinguished member of this Honorable Court in the case of Compañia General de Tabacos de Filipinas versus Collector of Internal Revenue, G. R. 23400, amounts to an "invidious discrimination" against foreign corporations with branch offices doing business in the Philippine Islands; and

That the decision of this Honorable Court as it stands amounts to a violation of the uniformity clause of the Jones Law, because the difference in the deductions granted to domestic corporations and foreign corporations with branch office in Manila will not now correspond to and bear a reasonable relation to the difference in the base of the tax.

In conclusion, it will thus be seen that as a result of this Honorable Court's construction a different and much more onerous rule is applied by the Income Tax Law for foreign corporations than for domestic corporations engaged in business of exactly the same kind and character. This, we respectfully contend, constitutes a denial of the equal protection of the laws and is violative of the guaranties a af-

forded all persons within the Philippine Islands by the Jones Law. (Leecraft v. Texas Co. 231 Fed. 918; Southern R. Co. v. Greene, 216 U. S. 400, 54 L. Ed. 536.) The equal protection of the laws means subjection to equal laws applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the Philippine Islands, and it is no longer open to discussion that it is (Pambina Consol. Mining etc., Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Gulf, etc. R. Co., v. Ellis, 165 U. S. 150, 41 L. Ed. 666; Blake v. McCluy, 172 U. S. 239, 43 L. Ed. 432), it is entitled to stand before the law on equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, all other persons in a like situation. Foreign corporations may not thus be arbitrarily discriminated against without any real or substantial basis therefore, such arbitrary selection not being justifiable as an exercise of the right of classification of the subjects of taxation (Gulf, etc. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92; Connody v. Union Sewer Pipe Co., 184 U. S. 540, 559, 46 L. Ed. 679).

Manila, P. I., December 17, 1927.

Respectfully submitted,

DEWITT, PERKINS & BRADY,

By: WILLIAM C. BRADY,

Attorneys for the Compañia General de Tabacos de Filipinas.

On February 8, 1928, the Supreme Court of the Philippine Islands denied the foregoing motion in the following resolution, with Mr. Justice Johnson and Mr. Justice Street dissenting therefrom:

> "Considering the motion of the attorneys for the plantiff-appellee in case R. G. No. 27766, Compañia General de Tabacos de Filipinas vs. Collector of Internal Revenue, praying for the reasons given, that the decision heretofore rendered therein be reconsidered, the Court, sitting in banc, DENIED THE MOTION. Messrs. Justices Johnson and Street dissented upon the grounds set forth in their separate opinions filed therein."

The respective dissenting opinions of Messrs. Justices Johnson and Street read as follows:

JOHNSON, *J., dissenting*:

At the time this case was considered and voted I reserved my vote for the reason that I did not then have time to look into the authorities. Since that time I have taken the pains to examine the authorities upon the question presented by the appellant and I now dissent from the conclusions of the majority opinion, and vote to grant the reconsideration prayed for.

The only question presented by the appellant, under the stipulated facts, relates to the meaning of the phrase "total net income received from all *sources* within the Philippine Islands" by the appellee as that phrase is used in section 10 of Act 2833 (March 7, 1919; Vol. 14, P. L., p. 221), as amended

by section 7 of Act 2926 (March 20, 1920; Vol. 15, P. L., p. 260.) Said section 10 provided for a tax of *two* per cent upon net incomes while said section 7 required payment of *three* per cent upon net incomes; otherwise the important part of said section (10) remains the same.

This case was decided upon the following stipulated facts:

"I.

"That plaintiff is a corporation duly organized and existing under the laws of the Kingdom of Spain, duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila.

"II.

"That defendant is the duly appointed, qualified, and acting Collector of Internal Revenue for the Philippine Islands.

"III.

"That plaintiff is the owner of several 'haciendas,' sugar and oil mills and tobacco factories located in the Philippine Islands destined to the production or manufacture of tobacco, sugar, copra, and coconut oil for sale therein and in foreign countries; and has been and is still engaged, in the Philippine Islands, in the shipping business and in the buying and selling of tobacco, sugar, copra, and oil and in

the exportation of the same, and that its business has been, and is being done mainly in the Philippine Islands.

"IV.

"That the Philippine branch of the plaintiff corporation on various dates during the year 1922 exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of P114,226.80, Philippine currency.

"V.

"That, likewise, the plaintiff's Philippine branch on various dates during said year 1922, exported from the Philippine Islands a certain quantity of manufactured tobacco produced by it in the Philippine Islands which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, deriving from such transactions a profit of P296,341.19, Philippine currency.

"VI.

"That, likewise, the plaintiff's Philippine branch on various dates during the said year 1922, exported from the Philippine Islands a certain quantity of copra and a certain quantity of coconut oil, produced, purchased, or manufactured by it in the Philippine Islands, which were sold in the United States by the agency therein of the plaintiff's Philippine branch, such sales being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, and that from such transactions on copra and coconut oil the plaintiff suffered losses amounting to P10,243.14, Philippine currency.

"VII.

"That deducting the sum of P10,243.14, the losses mentioned in Paragraph VI of this stipulation, from the sum of P410,567.99, the aggregate of the profits mentioned in Paragraphs IV and V, there remained a net profit of P400,324.85.

"VIII.

"That the said net profit of P400,324.85, together with other gains, profits, or income were accounted for by the plaintiff on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, thereby subjecting such profits, gains, or incomes to further

business deductions—management expenses, losses, etc.

"IX.

"That the defendant Collector of Internal Revenue, acting and pretending to act under the provisions of Act 2833 (Philippine Income Tax Law), as amended by Act 2926 livied and assessed against plaintiff a tax of three (3) per centum on the amount of the aforesaid net profits (₱400,324.85) earned by plaintiff as recited in Paragraphs IV, V, and VI hereof, in the sum of ₱12,009.75, Philippine currency.

"X.

"That on the 18th day of October, 1923, plaintiff, in order to avoid the infliction upon it of fines and penalties and the distraint of its property by defendant, did pay to defendant, under instant protest in writing, the said sum of ₱12,009.75, Philippine currency.

"XI.

"That plaintiff's protest against the payment of the aforesaid tax was overruled and denied by defendant on the 20th day of October, 1923, and defendant has refused, and still continues in his refusal, to return to plaintiff, on demand, the said sum of ₱12,009.75, Philippine currency, or any part thereof.

"XII.

"That the parties hereto reserve the right to introduce evidence, direct or rebuttal, on any point not herein stipulated and which may be deemed material and necessary for the proper determination of this case."

That part of said section 7, important for this decision, provides that:

"Sec. 7. Section ten (a) of the same Act (Act 2833) is hereby amended to read as follows:

" 'Sec. 10. (a) There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company, partnership, joint-account (cuenta en participación), association, or insurance company, organized in the Philippine Islands, no matter how created or organized, but not including duly registered general co-partnerships (compañias colectivas), a tax of three per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources within the Philippine Islands by every corporation, joint-stock company, partnership, joint-account (cuenta en participación,) association or insurance company, organized, authorized or existing under the laws of any foreign country, including interest on bonds, notes or other interest bearing obligations of residents, corporate or otherwise, and including the income derived from

dividends or net profits subject to the tax established in this subsection.' "

From a careful reading of said section 7 it will be seen that a tax "upon the total net income" is imposed upon all classes of entities, each class including exactly the same kind of commercial entities. They are (a) domestic corporations, etc., and (b) foreign corporations, etc., doing business within the Philippine Islands. The first class is required to pay the tax upon the total net income received "from all sources", while the second class is required to pay the tax upon the total net income received "from all sources within the Philippine Islands." From the provisions of said section it at once becomes evident that it was not the intention of the legislature to collect taxes from foreign corporations on income "from sources without the Philippine Islands." From the provisions of said section it is evident that the legislature did not intend to collect taxes upon incomes received by foreign corporations from their business or branches of business outside of the Philippine Islands. The legislature of the Philippine Islands under said section did not presume that it had authority to collect taxes upon the income of foreign corporations received from sources without the Philippine Islands.

We have then the question squarely presented: What is the meaning, scope and effect of the phrase used in said section, "from all sources within the Philippine Islands?" While we have been unable to find any judicial interpretation of that phrase,

happily we have found an interpretation of the phrase by those who are authorized to speak upon that question.

In 1916 (September 8, 1916) the Congress of the United States adopted "an Act to increase the revenue and for other purposes". (Vol. 39, part I, U. S. Stat. at Large, p. 756.) Section 10 of that Act is in exactly the same language (except as to the rate of taxation) as section 7 of Act 2926. Said section contained the phrase "the total net income received from all sources within the United States" as applied to foreign corporations. In the said Act of 1916 the phrase "from all sources within the United States" was first used by Congress. The phrase used in the Act of Congress of 1913 was "business transacted and capital invested within the United States." Congress, for some reason or other, found it advisable to change the phrase "business transacted and capital invested within the United States" to the phrase "from sources within the United States." By the Act of Congress of October 3, 1917, (Vol. 40 U. S. Stat. at Large, p. 303) the term "net income" as applied to foreign corporations, is defined to mean, "the net income received from sources within the United States." (See also the Revenue Act of Congress for the year 1918.)

A question arose in the Revenue Department of the United States concerning the meaning of the phrase "from sources within the United States" as used in the Act of Congress of 1916. That question

was referred to the Attorney-General of the United States (32 Opinions of the Attorney-General of the United States, p. 336). After a careful consideration of the meaning of said phrase the Attorney-General said:

"No income is derived from the mere manufacture of goods; before there can be income there must be sale; and there is no income from sources 'within the United States from goods manufactured here (United States) unless there is, in the language of the statute, both manufacture and disposition of goods within the United States'. The purpose of the 1918 statute is to tax only income that accrues within the United States. Congress does not attempt to tax profits arising from goods manufactured in this country but sold after being shipped abroad, without being disposed of by the owner in this country (United States). When the corporation manufactures or partially manufactures articles in this country (United States), but does not sell them until they are taken abroad, there is no income 'from sources within the United States.' For the reasons given it is concluded that income which may accrue to a foreign corporation by the sale of merchandise purchased in the United States, but sold outside of the United States, is not income from 'sources within the United States.' "

That ruling by the Attorney-General was immediately accepted and followed as a correct interpretation of the phrase "from sources within the United States" by the Revenue Department of the Uni-

ted States Government; and not only that, but the same interpretation was followed in a later opinion of the Attorney-General of the United States, holding that the interpretaton given by the Attorney-General under the Act of 1916 was a correct interpretation of the use of that phrase in the Acts of Congress of 1921 and 1924. (Jan. 21, 1924, 34 Opinions of the Attorney-General of the United States, 93; 5 Treasury Bulletin, 1-39-519; Holmes Federal Taxes, 6th Ed., p. 416.)

The opinions of the Attorney-General and the regulations issued in accordance therewith, by the Treasury Department of the United States were followed until 1921, when by an Act of Congress of November 23, 1921 (Vol. 42, Part I U. S. Stat. at L., p. 227), entitled "An Act to reduce and equalize taxation, to provide revenues, and for other purposes" and in subsection (e) of section 217 of that Act, an apportionment was provided of incomes derived partly within and partly without the United States. Said subparagraph (e) provided that "items of gross income, expenses, losses and deductions, other than those specified in subdivisions (a) and (e) of said section (217) shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary (of the Treasury). Where items of gross income are separately allocated to 'sources within the United States' there shall be deducted the expenses, losses and other deductions properly apportioned or allocated thereto

and a ratable part of other expenses, losses or other deductions which cannot definitely be allocated to some item or class of gross income. In the case of gross income derived from sources partly within and partly without the United States, the net income may first be computed by deducting the expenses, losses or other deductions apportioned or allocated thereto and a ratable part of any expenses, loses or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such net income attributable to sources within the United States may be determined by processes or formulas of general apportionment prescribed by the Commissioner with the approval of the Secretary. Gains, profits and income from (1) transportation without the United States, or (2) from the sale of or other services rendered partly within and partly personal property produced (in whole or in part) by the taxpayer within and sold without the United States, or produced (in whole or in part) by the taxpayer without and sold within the United States, shall be treated as derived partly from sources within and partly from sources without the United States. Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States *shall be treated as derived entirely from the country in which sold.*" (Subsection (e), section 217 of Act of Congress of November 23, 1921.)

It will be noted that this section provides that

all "gains, profits and income derived from the purchase of personal property within and its sale without the United States shall be treated as derived entirely from the country in which *sold.*" Thus, the opinion of the Attorney-General, quoted above, is followed and ratified by said Act of Congress of 1921.

Subsection (e) of section 217 of the Act of Congress of November 23, 1921 (42, Part I. U. S. Stat. at L., p. 244) was carried forward and made subsection (e) of section 217 of the Act of Congress of June 2, 1924, with some changes in the last two lines. (43, Part I, U. S. Stat. at L., p. 74.)

Said subsection (e) of Section 217 of the Act of Congress of 1921 was amended in subsection (e) of section 217 of the Act of Congress of 1924 in the following manner. In the last two lines the language in the Act of 1921 was "shall be treated as derived entirely from the country in which sold", whereas the last two lines of subsection (e) of section 217 of the Act of 1924 read: "derived entirely from sources within the country in which sold." Again, it will be seen that the Congress of the United States in both of said subsections (e) adhered to the doctrine announced by the Attorney-General in Vol. 32, Opinions of the Attorney-General of the United States, p. 336, providing expressly that "gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall

be treated as derived entirely from sources within the country in which *sold*."

THE INCOME IN QUESTION, BY THE STIPULATED FACTS AND BY THE ADMISSION OF THE ATTORNEY-GENERAL IN THIS COURT, WAS DERIVED FROM MERCHANDISE SOLD IN THE UNITED STATES

Considering the similarity of the statute here and the Acts of Congress of 1916, 1917, 1918, 1921 and 1924, and the meaning of the phrase "total net income received from all sources within the United States" (total net income received from all sources within the Philippine Islands) as interpreted not only by the highest fiscal department in the United States and followed by the Revenue Department, but by the Congress of the United States, to wit: that "no income is derived from the mere manufacture of goods; before there can be income there must be sale; and there is no income from 'sources within the United States' from goods manufactured in the United States unless there is, in the language of the statute, 'both manufacture and disposition of the goods within the United States'. The purpose of the 1916 statute is to tax only income that accrues within the United States. Congress does not attempt to tax profits arising from goods manufactured in this country but sold after being shipped abroad without being disposed of by the owner in this country (United States). When a foreign corporation manufactures or partially manufactures articles in this country (United States) but does not sell them until

they are taken abroad, there is no income 'from sources within the United States.' "

From the foregoing we are led to the question, where were the merchandise involved in this question sold? We find the answer to that question (1) in the stipulated facts (paragraphs 4, 5, 6 of the stipulated facts) and (2) in the brief of the Attorney-General (p. 6). Said paragraphs of the stipulated facts expressly provide that the merchandise from which the income in question arose "*was sold in the United States.*" The Attorney-General in his brief, at page 6, also makes the statement that: "It is true that the sale of the articles was made in the United States." In our opinion it would be a great injustice to the appellee if the stipulation presented at the beginning of the trial and the admission of the Attorney-General after the trial should be construed now to the prejudice of the appellee. We do not believe, in view of said stipulation and admitted fact by the Attorney-General, that any question should be raised at this time as to the place of the sale. The question of the place of the sale has been admitted to be in the United States.

It is argued, however, in the majority opinion that inasmuch as the sale was by an agent in the United States, "the sale being subject to confirmation, etc., as to price and other terms and conditions," that the sale was not made in the United States according to the stipulated facts, but was made in fact in the Philippine Islands. We cannot give our assent to that argument. The sale took place, by agree-

ment of the parties, where the goods were, in the United States at the time of the sale.

We must not confuse the source of property with the source of income from property.

The taxing power of the Philippine Islands does not extend beyond its territorial limits. The Philippine Government has no authority to tax property nor an income from property beyond its territorial limits. The Legislature evidently recognized the limitation of its powers when it provided in section 10 above quoted for a tax upon "the total net income received from all sources *within* the Philippine Islands."

The place where the sale of personal property takes place is always a question of fact, depending upon the facts and circumstances of each particular case. A few examples may serve to illustrate:

First Example: "A" is a manufacturer or producer of hats in the city of Manila. He has an agent in the city of Dagupan. He sends hats from time to time to his agent to be sold in Dagupan. The place of sale in this example is evidently Dagupan and not Manila.

Second Example: "A" is a manufacturer of hats in the City of Manila. "B", a citizen of Dagupan, orders a number of hats to be sold by him on his own account as a merchant in the city of Dagupan. The entire transaction takes place in the city of Manila. In this case the sale of the hats takes place in the city of Manila.

Third Example: "A" is a manufacturer of

hats in the city of Manila. "B" orders a number of hats from "A" to be delivered and paid for at the city of Dagupan. In such a case the sale takes place at the city of Dagupan and not in the city of Manila.

Fourth Example: "A", a manufacturer of hats in the city of Manila, entered into a contract with "B" to deliver a quantity of hats in good condition in the City of New York. The hats were damaged in transit. The sale was not complete until the hats were delivered in good condition in the city of New York. The sale was made in the city of New York and not in the city of Manila. (McCullough & Co. vs. Berger, 43 P. R., 823; 35 Cyc., pp. 274, 275, 276.)

Fifth Example: "A" is a manufacturer of hats in the city of Manila. He has an agent in the city of San Francisco to whom he sends large quantities of hats to be sold by his agent. "A" reserves the right to fix the price and conditions of the sale from time to time, as well as to confirm all sales. The hats were sold by the agent in San Francisco in accordance with the arrangement with "A". The sale is made in the United States.

Sixth Example: "A" is a foreign corporation doing business in the Philippine Islands and is a manufacturer and purchaser of hats in the city of Manila. From time to time he ships his products to the city of San Francisco in the United States to be sold there. He has a bodega or store in San Francisco. From time to time he goes to the United States and personally, as opportunity presents itself, sells said merchandise in the United States. The

sale is made in the United States, notwithstanding the fact that his books of account concerning the purchase, manufacture and sale of said hats are kept in the branch office in the city of Manila.

THE FACT THAT THE SALE IN THE UNITED STATES WAS SUBJECT TO CONFIRMATION BY THE PHILIPPINE BRANCH DOES NOT MAKE THE SALE ONE IN THE PHILIPPINE ISLANDS.

The fact that the Philippine branch of the plaintiff corporation reserved the right to control its agent in the United States in the sale of merchandise in question does not make the sale, a sale within the Philippine Islands. The sale was made in the United States as per the stipulated facts and admission of the Attorney-General. The control of the sale as to price, etc., does not change the *place* of the sale of the merchandise. The Philippine branch of the plaintiff corporation simply took the precaution of having full control of the acts of its agents in the United States. The condition would have been exactly the same had the principal accompanied the merchandise to the United States and sold it. The sale by the agent does not change the place of sale. Corporations can only act through their agents.

THE PLAINTIFF IS SUBJECTED TO DOUBLE TAXATION

Under the stipulated facts the plaintiff is doing business in the United States. It has an income from said business. Under the Acts of Congress of 1916-24 it is subject to pay an income tax upon the "gains, profits and income derived from the purchase of personal property without the United

States" and under the decision of the majority opinion, he is also required to pay a tax upon the same income in the Philippine Islands. He is therefore subjected to a double tax on the same income.

Under the doctrine of the majority opinion the plaintiff, as a foreign corporation, bears an unequal burden to that imposed upon domestic corporations, notwithstanding the fact that it was the "purpose, and intent of the Legislature that a foreign corporation which has a branch office in the Philippine Islands and engaged in business here should pay the same amount of income tax on that business as a domestic corporation."

DOMESTIC AND FOREIGN CORPORATIONS SUBJECTED TO UNEQUAL BURDEN.

If the doctrine of the majority opinion is the correct interpretation of the law, then domestic and foreign corporations are subjected to unequal burden in accordance with the provisions of paragraphs (a) and (b) of section 12 of Act 2833. Their allowable deductions are not the same.

It is well established that a state, or territory authorized to legislate for itself, may regulate the activities of foreign corporations within the state or such territory, but it cannot regulate or interfere with what foreign corporations may do outside.

The plaintiff was authorized, through its branch office, to do business in the Philippine Islands. If it chose to do business outside of the Philippine Islands it had a perfect right to do so and the Philippine Legislature has no authority to place a burden

upon the business done outside of the Philippine Islands.

Allgeyer vs. Lousiana, 165 U. S. 578
St. Louis Compress Co. vs. Arkansas, 260 U. S. 346
Compañía General de Tabacos de Filipinas vs. Coll. of Int. Rev., decided by the Supreme Court of the U. S., Nov. 21, 1927.

In my opinion the motion for reconsideration should be granted and the judgment appealed from should be affirmed.

E. FINLEY JOHNSON.

STREET, *J.*, *dissenting*:

Although I signed the original opinion in this case I am constrained, upon further reflection, to record the belief that the assent thus given to the decision was ill-advised,—a mistake apparently due to an erroneous perception of the bearing upon this case of the two opinions of the Attorney-General of the United States and certain Congressional legislation referred to in the dissenting opinion of Mr. Justice Johnson. In dealing with a statute adopted by the Philippine Legislature from an Act of Congress we should be careful to take the law with the interpretation placed upon it by competent authority in the United States; and special care should be taken about this in dealing with the intricate matters covered by the income-tax laws. Our endeavor should be to cooperate, as far as possible, with the Revenue

Department of the United States, in making the operation of these laws just and uniform.

The opinions of the Attorney-General of the United States to which reference has been made sustain the proposition that when merchandise is purchased or produced in one country and sold in another, the place of sale is to be taken as the place of the source of income for the purpose of applying a law such as is under consideration in this case; and it will be noted that the ruling thus made arose upon facts where the conclusion reached was contrary to the interests of the Government revenue,—a circumstance which indicates that probably no strong considerations in favor of the Government were overlooked. In addition to this subsequent legislation of Congress, while accepting said proposition as a general rule, has defined the particular cases where a different rule shall be applied. But in the Philippine Islands we have none of this supplemental legislation, with the result that the rule enunciated by the Attorney-General is applicable in its full extension in this jurisdiction, not of course as a binding rule of law but as a competent interpretation of the statute from which our own law is taken.

My conclusion is in conformity with that reached by Mr. Justice Johnson, namely, that the decision heretofore entered in this case should be set aside and the appealed judgment affirmed.

THOS. A. STREET.

On February 9, 1928 the Clerk of the Supreme Court of the Philippine Islands entered the final judgment which reads as follows:

[CAPTION OMITTED]

The Court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the Court upon the record, its decision and order for judgment having been filed on the 6th day of December, A. D. nineteen hundred and twenty-seven;

By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Manila, dated the 16th day of November, nineteen hundred and twenty-six, and from which the above-entitled appeal was taken, be, and the same is hereby, reversed and the complaint dismissed, with costs for the defendant.

It is further ordered that the appellant recover from the appellee the sum of P40.00 as costs.

(Sgd.) V. ALBERT
Clerk of the Supreme Court of the Philippine Islands.

I, V. ALBERT, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing final judgment was entered in the record on February 9, 1928.

V. ALBERT
Clerk of the Supreme Court of the Philippine Islands.

On February 14, 1928, the plaintiff and appellee filed the following exception and notice of intention to petition for a writ of certiorari:

[CAPTION OMITTED]

Comes now the appellee in the above entitled case, by its undersigned attorneys, and hereby excepts to the order promulgated by this Honorable Court on the 8th day of February, 1928, overruling its motion for reconsideration of the decision theretofore rendered in this case, and also excepts to the final judgment entered herein, and hereby gives notice of its intention to apply to the Supreme Court of the United States for a writ of certiorari for the review of the decision and judgment of this Court entered in this cause, and respectfully requests that the record of this cause be retained in this Court pending the preparation of the petition and of the record to accompany the same.

Manila, P. I., Febraury 14, 1928.

DEWITT, PERKINS & BRADY,
By: WILLIAM C. BRADY,
Attorneys for the appellee,
601 Pacific Bldg., Manila.

On February 16, 1928, the defendant and appellant filed the following opposition:

[CAPTION OMITTED]

Comes now the undersigned on behalf of the defendant-appellant in the above-entitled case and opposes the petition of February 14, 1928 of the plaintiff-appellee herein, for the reason that there is no ground for appealing this case to the Supreme Court of the United States by writ of certiorari inasmuch as there is no question in this case involving the Constitution or any statute, treaty, title, right or privilege of the United States and the value in controversy does not exceed $25,000.

Manila, February 16, 1928.

DELFIN JARANILLA,
Attorney-General.

On the same date, to wit, February 16, 1928, the Supreme Court issued the following order:

Considering the motion of the attorneys for the appellee in case R. G. No. 27766, Compañía General de Tabacos de Filipinas vs. Collector of Internal Revenue, excepting to the order of this Court overruling the appellee's motion for the reconsideration of the decision heretofore rendered therein and to the final judgment entered in said case, and giving notice of appellee's intention to apply for a writ of certiorari to the Supreme Court of the United States of Amer-

ica for the review of said decision and judgment, and praying that the record of said case be retained in this Court pending the preparation of the application for a writ of certiorari and of the proceedings to be had in the Supreme Court of the United States: Exception noted and the amount of the bond for the stay of the execution of judgment is hereby fixed at ₱1,000.00 to be filed with this Court within ten days from notice hereof and to be approved by Mr. Justice Johns, after hearing the defendant as to the sufficiency of the same and as to the solvency of its

In due time the bond was filed with the Supreme Court and duly approved by the Honorable Charles A. Johns, Associate Justice of said Court.

United States of America

PHILIPPINE ISLANDS

In the Supreme Court of the Philippine Islands

I, V. ALBERT, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing 63 printed pages contain a true and correct translation and transcript of the record of the case entitled Compañía General de Tabacos de Filipinas, plaintiff and appellee, *versus* Collector of Internal Revenue, defendant and appellant, bearing No. 27766 of the docket of this Supreme Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court this ... day of June, one thousand nine hundred twenty-eight.

V. ALBERT,
Clerk of the Supreme Court
of the Philippine Islands.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 22, 1928

The petition herein for a writ of certiorari to the Supreme Court of the Philippine Islands is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
AUG 7
CHARLES ELMORE

In the Supreme Court of the United States

No. 335

..... Term, 19 .....

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

VERSUS

COLLECTOR OF INTERNAL REVENUE,
Respondent.

PETITION FOR CERTIORARI
AND
BRIEF IN SUPPORT OF SAME

C. A. DEWITT,
E. A. PERKINS,
Attorneys for the Petitioner.

"DIA FILIPINO" PRESS, 1092 R. Hidalgo, Manila.—Tel. 2-14-30.

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In the Supreme Court of the United States

No. .....

..... Term, 19 .....

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

VERSUS

COLLECTOR OF INTERNAL REVENUE,
Respondent.

(PETITION FOR CERTIORARI)

To the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court of the Philippine Islands in the case of Compañia General de Tabacos de Filipinas, plaintiff-appellee, versus Collector of Internal Revenue, defendant-appellant. The decision of the Supreme Court of the Philippine Islands was promulgated December 6, 1927 (R. 20); final judgment was entered February 9, 1928 (R. 60), two Justices dissenting.

Your petitioner submits the following summary and

short statement of the matter involved and the reasons relied on for the allowance of the writ.

STATEMENT

I

On October 17, 1925 (R. 1) petitioner filed in the Court of First Instance of the City of Manila in the Philippine Islands its complaint in an action commenced to recover from the respondent Collector of Internal Revenue the sum of ₱12,009.-75, Philippine currency, paid to said respondent under protest as an internal revenue tax upon income derived from sales of Philippine products in the United States.

II

Said complaint avers in substance that petitioner is a corporation organized and existing under the laws of the Kingdom of Spain duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila; that respondent is the Collector of Internal Revenue for the Philippine Islands; that petitioner during the year 1922 exported from the Philippine Islands and sold in the United States of America certain quantities of merchandise at a profit; that the respondent, pretending to act under the provisions of Act 2833, as amended by Act 2926 (Philippine Income Tax Law) unlawfully assessed against, and collected from peti-

tioner the sum of twelve thousand and nine and 75/100 pesos (₱12,009.75) as a tax of three (3%) per cent on the amount of the profits earned by petitioner from the sales of said merchandise in the United States of America during the year 1922; that petitioner, in order to avoid the infliction upon it of fines and penalties and the distraint of its property, paid said sum under protest in writing; and that respondent denied said protest and refused and failed to return said sum to your petitioner.

III

The prayer of the complaint (R. 4) was for judgment for the said sum so paid to said respondent with costs.

IV

On November 18, 1925, the Attorney-General of the Philippine Islands filed an answer on behalf of respondent (R. 4) wherein it was alleged among other things that the taxes sought to be recovered by petitioner were lawfully levied, assessed and collected under the provisions of said Acts 2833 and 2926.

V

On January 22, 1926 your petitioner filed an amended complaint (R. 6) to meet certain minor objections to the original complaint raised by respondent's answer.

VI

The cause was heard and determined on an agreed statement of facts (R. 8), and on November 16, 1926 (R. 13) judgment was entered in said Court in favor of your petitioner, and against the respondent as prayed for in the complaint, without any express finding as to costs.

VII

Thereafter an appeal was taken by respondent to the Supreme Court of the Philippine Islands and the case was duly docketed in said Court on April 30, 1927 (R. 19).

VIII

On December 6, 1927 the Supreme Court of the Philippine Islands rendered its decision whereby it reversed the judgment of the lower Court (R. 20).

IX

On December 20, 1927 petitioner filed a motion for a rehearing (R. 33) which was denied by the Supreme Court of the Philippine Islands on February 8, 1928, two Justices dissenting (R. 40).

X

On February 14, 1928, petitioner filed an exception to the order of the Supreme Court of

the Philippine Islands dated February 8, 1928, overruling the motion for reconsideration of the decision rendered in this case, and also to the final judgment entered therein, at the same time giving notice of its intention to apply to this Honorable Court for a writ of certiorari for the review of said decision and judgment of said court, and prayed that the Court retain therein the record of said cause pending the preparation of said petition and of the record to accompany the same (R. 61).

XI

On February 16, 1928, the Supreme Court of the Philippine Islands, acting on the exception and motion described in the preceding paragraph, passed the following resolution:

> "Considering the motion of the attorneys for the appellee in case R. G. No. 27766, Compañía General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, excepting to the order of this Court overruling the appellee's motion for the reconsideration of the decision heretofore rendered therein and to the final judgment entered in said case, and giving notice of appellee's intention to apply for a writ of certiorari to the Supreme Court of the United States of America for the review of said decision and judgment, and praying that the record of said case be retained in this Court pending the pre-

paration of the application for a writ of certiorari and of the proceedings to be had in the Supreme Court of the United States: Exception noted and the amount of the bond for the stay of the execution of judgment is hereby fixed at ₱1,000.00 to be filed with this Court within ten days from notice hereof and to be approved by Mr. Justice Johns, after hearing the defendant as to the sufficiency of the same and as to the solvency of its sureties." (R. 62.)

XII

On February 9, 1928, the final judgment of the Supreme Court of the Philippine Islands was entered as follows:

JUDGMENT

"The Court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the Court upon the record, its decision and order for judgment having been filed on the 6th day of December, A. D. nineteen hundred and twenty-seven.

By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Manila dated the 16th day of November, nineteen hundred and twenty-six, and from which the above-en-

titled appeal was taken, be, and the same is hereby, reversed and the complaint dismissed, with costs for the defendant.

It is further ordered that the appellant recover from the appellee the sum of ₱40.00, as costs." (R. 60.)

XIII

Thereafter, in due time petitioner filed a bond in the amount of ₱1000.00 with the Clerk of the Supreme Court of the Philippine Islands, and said bond was approved by the Hon. Chas. A. Johns, Associate Justice of the Supreme Court of the Philippine Islands, in accordance with the resolution of said Court dated February 16, 1928 (R. 63).

REASONS FOR THE ALLOWANCE OF THE WRIT

Your petitioner urges the following reasons for the allowance of the writ of certiorari herein prayed for:

1. The pertinent language of section 10 of Act 2833, as amended by section 7 of Act 2926, is as follows:

> "Sec. 10. (a) There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from ALL sources by every corporation * * * organized in the Philippine Islands, * * * a tax of

three per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from *all sources within the Philippine Islands* by every corporation * * * organized, authorized, or existing under the laws of any foreign country." (Italics inserted.)

2. The Supreme Court of the Philippine Islands has held that the words "sources within the Philippine Islands", as applied to foreign corporations with branches in the Philippine Islands, embraces income received from profits on sales made by such corporations of Philippine products in the United States of America.

The question involved is of public concern, affecting, as it does, the revenue of the Philippine Government and the income of all mercantile and trading foreign corporations with branch offices in the Islands engaged in selling the products of said Islands abroad.

The Supreme Court of the Philippine Islands has decided the case upon the theory that a foreign corporation with a branch office in the Philippines and doing business in said Islands should pay the same tax on profits derived from sales abroad as a domestic corporation is required to pay. Your petitioner is advised that said decision of the Supreme Court of the Philippine Islands is erroneous and repugnant to the whole scheme of the income tax law, for foreign corpo-

rations and domestic corporations are not on the same footing for taxation purposes.

The effect of said decision is to permit that which it was the object of the law to avoid, to wit, double taxation, for although taxes paid to the United States Government are allowable as a deduction to foreign corporations, no such deduction is allowed when the taxes are paid elsewhere.

The income derived from the transactions described in the instant case is taxable in the United States under the decisions and rulings of the Treasury Department as being "income from sources within the United States" (32 Opinions Atty. General of the United States 336; 5 Treasury Bulletin 1-39-519; Holmes, Fed. Taxes, 1923 Edition, p. 82; Holmes, Fed. Taxes, Sixth Edition, p. 416; 34 Opinions Atty. General of the United States 93), and that, accordingly, such income should not be considered in the Philippine Islands as "income from sources within the Philippine Islands".

The said decision of the Supreme Court of the Philippine Islands violates the uniformity clause of the Jones Law, because the difference in the deductions granted to domestic corporations and foreign corporations with branch offices in Manila will not now correspond to and bear a reasonable relation to the difference in the base of the tax.

The said decision of the Supreme Court of the Philippine Islands lays down a different and much more onerous rule for foreign corporations

than for domestic corporations engaged in business of exactly the same kind or character, and works such an injustice as to call for an exercise of this Honorable Court's power of supervision.

Again, said decision conflicts with opinions of the Attorney General and of the Treasury Department of the United States in interpreting the Revenue Act of 1916 from which Act the section involved herein was taken by the Philippine Legislature.

Finally, the decision was reached by a divided Court, dissenting opinions having been written by Justices Johnson and Street (R. 40, 58).

WHEREFORE, and for the reasons set out at length in the brief filed herewith in support of this petition, petitioner prays that a writ of certiorari be issued to the Supreme Court of the Philippine Islands, commanding it to certify to this Honorable Court for its review and determination a transcript of the proceedings in said case, and that the judgment of said Court be reversed.

Respectfully submitted,

C. A. DEWITT,
E. A. PERKINS,
Attorneys for Petitioner,
601 Pacific Building,
Manila, P. I.

Manila, P. I.,
June 20, 1928.

In the Supreme Court of the United States

No. .....

..... Term, 19 .....

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

VERSUS

COLLECTOR OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion rendered by the Supreme Court of the Philippine Islands the review of which is sought herein has not yet been published in the Philippine Reports, but it is printed in full in Volume XXVI of the Philippine Official Gazette at pages 1712, *et seq.*, and on pages 20 to 33 in the record accompanying this brief.

The separate dissenting opinions of Justices Johnson and Street likewise appear on pages 40 and 58, respectively, of the printed record.

The opinion of the Court of First Instance of the City of Manila is transcribed on pages 13 to 18 of the record.

STATEMENT OF THE CASE

A fair and concise statement of facts of this case is set forth in the opinion of the Supreme Court of the Philippine Islands, in the following words:

> "Plaintiff is a corporation organized and existing under the laws of the Kingdom of Spain, duly licensed to transact business in the Philippine Islands, with its principal office in the City of Manila. The defendant is the Collector of Internal Revenue.
>
> Plaintiff alleges that during the year 1922 it exported from the Philippine Islands and sold in the United States certain quantities of centrifugal sugar, manufactured tobacco, copra and coconut oil, at a net profit of ₱400,324.85. That the defendant, acting and pretending to act under the provisions of Act No. 2833, as amended by Act No. 2926, unlawfully and illegally levied and assessed against the plaintiff a tax of three per centum on the amount of such profit during the year 1922 amounting to ₱12,009.75, which plaintiff paid under written protest on the ground that the profit which it obtained from the sugar and tobacco sold by it in the United States was subject to the income tax levied by the government of that country. That no part of plaintiff's profit was derived from sources within the Philippine Islands.

That plaintiff's protest was overruled and denied, and defendant has refused to return the amount of such tax. Wherefore, it prays for a corresponding judgment, with costs.

For answer the defendant made a general and specific denial of all of the material allegations of the complaint, except that which is specifically admitted. Defendant admits paragraphs 1, 2, 3, and 5 of plaintiff's complaint, except as to the amounts, and alleges that the taxes which plaintiff seeks to recover were lawfully levied, assessed and collected under the provisions of Act No. 2833, as amended by Act No. 2926, and defendant prays that plaintiff's complaint be dismissed, with costs.

The case was tried and submitted upon the following "Agreed Statement of Facts":

"I

"That plaintiff is a corporation duly organized and existing under the laws of the Kingdom of Spain, duly licensed to do business in the Philippine Islands, and maintaining its principal office in said Islands in the City of Manila.

"II

"That defendant is the duly appointed, qualified, and acting Collector of Internal Revenue for the Philippine Islands.

"III

"That plaintiff is the owner of several 'haciendas', sugar and oil mills and tobacco factories located in the Philippine Islands destined to the production or manufacture of tobacco, sugar, copra, and coconut oil for sale therein and in foreign countries; and has been and is still engaged, in the Philippine Islands, in the shipping business and in the buying and selling of tobacco, sugar, copra, and oil and in the exportation of the same, and that its business has been, and is being done mainly in the Philippine Islands.

"IV

"That the Philippine branch of the plaintiff corporation on various dates during the year 1922 exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of ₱114,226.80, Philippine currency.

"V

"That, likewise, the plaintiff's Philippine branch on various dates during said year 1922, exported from the Philippine Islands a certain quantity of manufactured tobacco produced by it in the Philippine Islands, which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, deriving from such transactions a profit of ₱296,341.19, Philippine currency.

"VI

"That, likewise, the plaintiff's Philippine branch, on various dates during the said year 1922, exported from the Philippine Islands a certain quantity of copra and a certain quantity of coconut oil, produced, purchased, or manufactured by it in the Philippine Islands, which were sold in the United States, by the agency therein of the plaintiff's Philippine branch, such sales being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, and that from such transactions on copra and coconut oil the plaintiff suffered losses amounting to ₱10,243.14, Philippine currency.

"VII

"That deducting the sum of ₱10,243.14, the losses mentioned in paragraph VI of this stipulation, from the sum of ₱410,567.99, the aggregate of the profits mentioned in Paragraphs IV and V, there remained a net profit of ₱400,324.85.

"VIII

"That the said net profit of ₱400,324.85, together with other gains, profits, or income were accounted for by the plaintiff on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, thereby subjecting such profits, gains, or incomes to further business deductions—management expenses, losses, etc.

"IX

"That the defendant Collector of Internal Revenue, acting and pretending to act under the provisions of Act 2833 (Philippine Income Tax Law), as amended by Act 2926, levied and assessed against plaintiff a tax of three (3) per centum on the amount of the aforesaid net profits (₱400,324.85) earned by plaintiff, as recited in Paragraphs IV, V, and VI hereof, in the sum of ₱12,009.75, Philippine currency.

"X

"That on the 18th day of October, 1923, plaintiff, in order to avoid the infliction upon it of

fines and penalties and the distraint of its property by defendant, did pay to defendant, under instant protest in writing, the said sum of ₱12,009.75, Philippine currency.

"XI

"That plaintiff's protest against the payment of the aforesaid tax was overruled and denied by defendant on the 20th day of October, 1923, and defendant has refused, and still continues in his refusal, to return to plaintiff, on demand, the said sum of ₱12,009.75, Philippine currency, or any part thereof.

"XII

"That the parties hereto reserve the right to introduce evidence, direct or rebuttal, on any point not herein stipulated and which may be deemed material and necessary for the proper determination of this case."

The case involves sales made in the United States of America during the year 1922 by the petitioner, a foreign corporation. It was to the sales thus made that the *income tax* of three per centum provided for by section 10 of Act No. 2833, as amended by section 7 of Act 2926, was held by the Supreme Court of the Philippine Islands to be applicable.

SPECIFICATION OF ERRORS TO BE URGED

I

The lower court erred in not giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833 as amended by section 7 of Act 2926 of the Philippine Legislature the same interpretation as that given to the law by the Revenue Department of the United States and the Attorney-General of the United States in construing section 10 of the Act of September 8, 1916, from which the Philippine Income Tax Act (Act 2833 of the Philippine Legislature as amended) was derived.

II

The lower court erred in holding that the income received by a foreign corporation with a branch office in the Philippines from the sale of sugar in the United States was income received by it "from sources within the Philippine Islands"—

(a) when the sugar was produced or purchased by the corporation in the Philippine Islands;

(b) when the sale was made in the United States by an agent of the corporation's Philippine branch "subject to confirmation and absolute control as to price and other terms and conditions by the corporation's Philippine branch";

(c) when said income was accounted for by the

corporation on its books of account "kept in the Philippine Islands as earnings made by and accruing to its Philippine branch."

III

The lower court erred in giving to the phrase "total net income received **FROM ALL SOURCES** within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, the same construction as if the same read: "total net income **RECEIVED WITHIN** the Philippine Islands".

IV

The lower court erred in giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, a construction such as would subject a foreign corporation with a branch office in the Philippine Islands to a double tax on the same income.

V

The lower court erred in giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, a construction such as would subject a foreign corporation with a branch office in the Philippine Islands, to a burden greater than that to which a domestic corporation engaged in the same business is subjected.

THE LAW

The provision of law involved herein is section 10 of Act No. 2833, the Philippine Income Tax Law, as amended by Act No. 2926 of the Philippine Legislature, the pertinent portion of which reads as follows:

> "Sec. 10. (a) There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from *all* sources by every corporation, * * * organized in the Philippine Islands, * * * a tax of three per centum upon such income, and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all *sources within the Philippine Islands* by every corporation * * * organized, authorized, or existing under the laws of any foreign country."

Bearing upon the proper construction of said section 10 of Act 2833 as amended are sections 12 (a) and 12 (b) of the same Act, the first relating to deductions allowable from the income of domestic corporations and the latter relating to deductions allowable from the income of foreign corporations doing business in the Philippine Islands. Under section 12 (a) a domestic corporation, in ascertaining its net income may deduct all the ordinary and necessary expenses paid within the year in the maintenance of its properties, including rentals pertaining to its agency in the United States. Under section 12 (b) a corporation organized under the laws of a foreign country, such as petitioner herein, is not

allowed to deduct from its gross income, expenses incurred by it in the maintenance of its agency in the United States, but only the expenses incurred by it in connection with its business and property including rentals for such property *within the Philippine Islands.*

ARGUMENT

I

The lower court erred in not giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, the same interpretation as that given to the law by the Revenue Department of the United States and the Attorney-General of the United States in construing section 10 of the Act of September 8, 1916 from which the Philippine Income Tax Act (Act 2833 of the Philippine Legislature as amended) was derived.

The case necessarily turns upon the meaning of the expression "sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926. This section of the Act was taken from and is an exact copy of section 10 of the United States Revenue Act of 1916, in which Act it was first used. There are no judicial decisions interpreting this expression as it is found in these Acts, other than the one herein sought to be reviewed. However, the Attorney-General of the United States, in a comprehensive opinion dated November 3, 1920, reported in Vol. 32, Opinions of the Attorney-General of the United States, at pages 336, *et seq.*, has held that income which may accrue to a foreign corpora-

tion by the sale of merchandise purchased in the United States, but sold outside of the United States was not income from "sources within the United States". The language used was as follows:

> "No income is derived from the mere manufacture of goods; before there can be income there must be a sale; and there is no income from sources 'within the United States from goods manufactured here (United States) unless there is, in the language of the statute, both manufacture and disposition of goods within the United States'. The purpose of the 1918 statute is to tax only income that accrues within the United States. Congress does not attempt to tax profits arising from goods manufactured in this country but sold after being shipped abroad, without being disposed of by the owner in this country (United States). When the corporation manufactures or partially manufactures articles in this country (United States), but does not sell them until they are taken abroad, there is no income 'from sources within the United States.' For the reasons given it is concluded that income which may accrue to a foreign corporation by the sale of merchandise purchased in the United States, but sold outside of the United States, is not income from 'sources within the United States.' "

That ruling by the Attorney-General was immediately accepted and followed as correct by the Revenue Department of the United States (Treas. Dec. 3111, Cu-

mulative Bulletin, Vol. 4, p. 280.) The entire opinion was later reconsidered by the Attorney-General of the United States and confirmed in its entirety in an opinion dated January 21, 1924 (34 Ops. Atty. Gen [U. S.] 93) in the following words:

> "After a full consideration it is my opinion that the former opinion of the Attorney-General (32 Op. Atty. Gen. 339) is a correct and true interpretation of the *Revenue Acts of 1916*, 1917, and 1918, with respect to the net income received from all sources within the United States by every foreign corporation • • •"

The latter opinion likewise received the approval of the Treasury Department of the United States. (Treas. Dec. 3376, Cumulative Bulletin III-1, pp. 211, *et. seq.*)

Now, the contemporaneous construction of a statute by those charged with its execution, as has been repeatedly stated by this Court, is entitled to great weight and should not be disregarded or overturned except when clearly erroneous (U. S. v. Johnston, 124 U. S. 236, 31 U. S. (L. Ed.) 389), the reason being that the officers concerned are usually able men and masters of the subject and not infrequently they are the very men who have drafted the laws they are afterwards called upon to interpret. (U. S. v. Moore, 95 U. S. 763, 24 U. S. (L. Ed.) 589; Brown v. U. S., 113 U. S. 571, 28 U. S. (L. Ed.) 1080; Heath v. Wallace, 138 U. S. 582, 34 L. Ed. 1068; U. S. vs. Hammers, 221 U. S. 220, 55 L. Ed. 710.) This principle of law, Judge Brewer aptly ob-

served in U. S. v. Union Pac. R. Co., 37 Fed. 551, since it was first announced by Justice Trimble in 1827, has gained strength every time it was again considered by the courts.

The Supreme Court of the Philippine Islands, however, instead of adopting the construction given to the law by the Attorney-General of the United States and the Treasury Department of the United States, as it was, we respectfully submit, its plain duty to do, and *without attempting to criticize the soundness thereof, or adducing any reasons why it should not be followed*, laid down in its decision herein a doctrine diametrically opposed thereto. In so doing it committed what appears to us clear error. As Mr. Justice Street has said in his dissenting opinion:—

> "In dealing with a statute adopted by the Philippine Legislature from an Act of Congress we should be careful to take the law with the interpretation placed upon it by competent authority in the United States; and special care should be taken about this in dealing with the intricate matters covered by the income-tax laws. Our endeavor should be to cooperate, as far as possible, with the Revenue Department of the United States, in making the operation of these laws just and uniform.
>
> "The opinions of the Attorney-General of the United States to which reference has been made sustain the proposition that when merchandise is purchased or produced in one country and sold in another, the place of sale is to be taken as the

> place of the source of income for the purpose of applying a law such as is under consideration in this case; and it will be noted that the ruling thus made arose upon facts where the conclusion reached was contrary to the interests of the Government revenue—a circumstance which indicates that probably no strong considerations in favor of the Government were overlooked." (Record, pp. 58-59).

The error into which the lower court had fallen becomes the more patent, considering that the Congress of the United States in later enactments on the same subject (subsection (e) of section 217 of the Revenue Act of 1921 and subsection (e) of section 217 of the Revenue Act of 1924) adhered to and ratified the doctrine announced by the Attorney-General of the United States in the following words:

> "gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from sources within the country in *which sold.*"

II

The lower court erred in holding that the income received by a foreign corporation with a branch office in the Philippines from the sale of sugar in the United

States was income received by it "from sources within the Philippine Islands"—

(a) when the sugar was produced or purchased by the corporation in the Philippine Islands;

(b) when the sale was made in the United Sates by an agent of the corporation's Philippine branch "subject to confirmation and absolute control as to price and other terms and conditions by the corporation's Philippine branch";

(c) when said income was accounted for by the corporation on its books of account "kept in the Philippine Islands as earnings made by and accruing to its Philippine branch".

III

The lower court erred in giving to the phrase "total net income received **FROM ALL SOURCES** within the Philippine Islands" used in section 10 of Act 2833 as amended by section 7 of Act 2926 of the Philippine Legislature the same construction as if the same read "total net income **RECEIVED WITHIN** the Philippine Islands."

Section 10 of Act 2833 of the Philippine Legislature as amended does not impose a tax upon all the income of a foreign corporation *received* by it *within* the Philippine Islands. What is taxed by the Act is the income received by such a corporation from *sources within* the Philippine Islands.

The natural, ordinary and familiar meaning of the word "source" conveys the idea of *origin*, and it is according to this popular signification that the term as used in the statute, particularly a tax statute, should be construed.

The income of a corporation engaged in the production or purchase of tobacco, sugar, copra and oil, for sale outside the Philippine Islands, such as petitioner herein, is due to a series of transactions beginning with the decision of petitioner's executive officers in the Philippine Islands, to buy or produce tobacco, sugar, copra, or oil; the actual purchase or production of the same; the shipment of these products to the United States and their storage there until sold; the efforts of petitioner's agency in the United States to find a prospective customer; the preliminary negotiations with the customer when found, leading up to a firm offer by the latter; tne transmission of the offer to petitioner's Philippine branch for sanction; the sanction or confirmation of the offer; the acceptance *by petitioner's agency in the United States* of the offer confirmed; *the actual sale, which is perfected and consummated in the United States;* the collection of the purchase price; the transfer of the proceeds to the petitioner's Philippine branch; and the entry of the income made thereby, in the books of account of petitioner's Philippine branch. By a forced construction, each and all of these diverse activities may be considered the source or origin of petitioner's income, since if one of these steps were omitted there would necessarily be no income forthcoming. Indeed, we may even go back and assign the original decision of the pe-

titioner's company in Spain to establish a branch office in the Philippine Islands as the source of petitioner's income, or we may take into consideration the fact that all the income received by the petitioner in the Philippine Islands eventually finds its way to Spain, where the main office of petitioner is located, and is accounted for in account books kept by the petitioner in that country.

It is respectfully submitted, however, that such is not the sense in which the term "source" is used in section 10 of Act 2833 of the Philippine Legislature, as amended. As used therein, the income of petitioner from a single transaction has only one source, and if that source be in the United States it cannot at the same time be situated in the Philippine Islands or elsewhere. Out of these multitudinous activities, that should be selected which brings the income from petitioner's property to fruition, and wherever that transaction was consummated, in that place lies the source of petitioner's income. A different construction such as that adopted by the lower court would wipe out the distinction made in the law with regard to the basis upon which the incomes of domestic and foreign corporations are to be taxed, for there can not possibly be a transaction effected in another jurisdiction by a foreign corporation doing business in the Philippine Islands which cannot be linked in some way with a previous or subsequent transaction, the situs of which is in the Philippine Islands.

This Honorable Court has defined income as "the gain derived from capital, from labor, or from both combined." (Stratton's Independence *v.* Hobert, 231 U. S.

399.) This definition has been extended so as to include "profit gained through a sale or conversion of capital assets". (Eisner v. Macomber, 252 U. S. 189; Merchant's Loan & Trust Co. vs. Smietanka, 255 U. S., 509; Doyle v. Mitchell Brothers, 247 U. S. 179.) There are, therefore, under this definition, only three possible sources of income: (1) capital, and/or (2) labor, and /or (3) sale of capital assets. Hence, in determining the source of a given item of income, the nature and location of the activities or property which produced the income is the controlling factor. If the income is from labor (services) the place where the labor is done is decisive; if the income is from capital, the place where the capital is employed is decisive; if the income is from the sale of capital assets, the place where the sale is made is likewise decisive. (Holmes, Federal Taxes, Sixth Ed. p. 396.

In the case at bar a part of plaintiff's working or revolving capital was employed in the United States. It was therein represented by raw materials and by stocks of partly finished and unfinished products, and if, thru the skill, ingenuity and sound judgment of from a combination of any or all of these factors, plaintiff's agents there were able to effect sales at a profit acceptable to plaintiff the profit thus received was income from sources within the United States, and not from sources within the Philippine Islands. The source of the profit thus received by petitioner was obviously situated "within the United States" and not "within the Philippine Islands."

The mere fact that the sale was made by an agent

in the United States "subject to confirmation and absolute control as to price and other terms and conditions" does not transform the sale into one made in the Philippine Islands, for these are merely rights incident to ownership and are inherent in every sale made through agents. As Mr. Justice Johnson has said in his dissenting opinion (R. p. 56.)—

> "The sale was made in the United States as per the stipulated facts and admission of the Attorney-General. The control of the sale as to price, etc., does not change the *place* of the sale of the merchandise. The Philippine branch of the plaintiff corporation simply took the precaution of having full control of the acts of its agents in the United States. The condition would have been exactly the same had the principal accompanied the merchandise to the United States and sold it. The sale by the agent does not change the place of sale. Corporations can only act through their agents."

Likewise, the circumstance that petitioner's income from the sale of the sugar, tobacco, copra and oil in question was accounted for by the corporation on its books of account "kept in the Philippine Islands as earnings made by and accruing to its Philippine branch" is indicative of the fact, which is freely admitted by petitioner, that said income was *received by it within* the Philippine Islands but *not* that it received said income *from sources within* the Philippine Islands.

IV

The lower court erred in giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, a construction such as would subject a foreign corporation with a branch office in the Philippine Islands to a double tax on the same income.

As we have already stated, the income derived from the transactions described in the stipulated facts of this case is taxable in the United States under the decisions and rulings of the Treasury Department as being "income from sources within the United States". (32 Ops. Atty. Gen. (U. S.) p. 336; 34 Ops. Atty. Gen. (U. S.) p. 93; Treas. Dec. 3111, Cum. Bulletin, Vol. 4, p. 280; Treas. Dec. III-1, p. 211.)

Under the decision of the Supreme Court of the Philippine Islands the petitioner is also required to pay a tax upon the same income in the Philippine Islands.

While there is nothing in the Philippine Organic Act (Act of Congress of August 29, 1916) prohibiting the imposition of double taxation, the taxation twice of the same income is contrary to all sound principles of taxation, is inherently unjust and unfair, and "ought wherever possible to be prevented". (Buck v. Beach, 206 U. S. 392, 51 L. Ed. 1106, 11 Ann. Cas. 732; Holmes, Federal Taxes, Sixth Ed., p. 398, quoting from Kidd v. Alabama, 188 U. S. 730, at p. 732). It can be prevented in this case, as we have already seen, by giving to the expression "sources within the Philippine Islands" used in section 10 of Act 2833 of the Philip-

pine Legislature its natural, ordinary and familiar meaning, sanctioned and approved in authoritative rulings repeatedly announced by the Treasury Department and by the Attorney-General of the United States.

V

The lower court erred in giving to the phrase "total net income received from all sources within the Philippine Islands" used in section 10 of Act 2833, as amended by section 7 of Act 2926 of the Philippine Legislature, a construction such as would subject a foreign corporation with a branch office in the Philippine Islands, to a burden greater than that to which a domestic corporation engaged in the same business is subjected.

We have seen that the decision of the lower court if allowed to stand would subject to the tax all the income received within the Philippine Islands by foreign corporations doing business there, to the same extent as domestic corporations, irrespective of the source of that income.

At the same time, the allowable deductions to foreign corporations, compared with the allowable deductions of domestic corporations are very much restricted, for while a domestic corporation may deduct from the gross amount of its income all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals, pertaining to its agency in the United States, the deductions allowed a foreign corporation is limited to expenses in connection *with its business and property*

including rentals for such property *within the Philippine Islands.*

This results from the provisions of the first paragraphs of sections 12 (a) and 12 (b) of Act 2833 which read as follows:

"SEC. 12. (a) In the case of a corporation, joint stock company, partnership, joint account (*cuenta en participacion*), association or insurance company, organized in the Philippine Islands, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—

First. All the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payment for the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity."

"(b) In the case of a corporation, joint-stock company, partnership, joint account (*cuenta en participacion*), association, or insurance company, organized, authorized, or existing under the laws of any foreign country, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources within the Philippine Islands—

First. All the ordinary and necessary expenses actually paid or deducted within the year out of earnings in the maintenance and operation of its business and property *within the Philippine Islands*, including rentals or other payments for the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity."

No lengthy argument is necessary to show that if the construction given to the law by the Supreme Court of the Philippine Islands is to prevail, the law is void as constituting a denial of the equal protection of the law

guaranteed to all persons in the Philippine Islands by the Jones Law (LeCraft v. Texas Co., 281 Fed. 918; Southern R. Co. v. Greene, 216 U. S. 400), since the difference in the deductions granted to domestic corporations and foreign corporations with branch offices in the Philippine Islands would not correspond, and bear a reasonable relation, to the difference in the basis of the tax. If the petitioner is a person within the jurisdiction of the Philippine Islands, and it is no longer open to discussion that it is (Pambeña Consol. Mining etc. Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650; Gulf, etc. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666; Blake v. McCluy, 172 U. S. 239, 43 L. Ed. 432), it is entitled to stand before the law on equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, all other persons in a like situation. It may not be arbitrarily discriminated against without any real or substantial basis therefor, such arbitrary selection not being justifiable as an exercise of the right of classification of the subjects of taxation. (Gulf etc. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92; Connody v. Union Sewer Pipe Co., 184 U. S. 540, 559, 46 L. Ed. 679.)

In conclusion, therefore, we respectfully submit that to give sections 10 of Act 2833, as amended by section 7 of Act 2926, the construction placed upon it by the Supreme Court of the Philippine Islands would render it unconstitutional and void as being an unjust discrimination against foreign corporations.

CONCLUSION

For these reasons we ask the allowance of the writ of certiorari prayed for in this matter.

Manila for Washington, D. C., June 20, 1928.

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Attorneys for Petitioner.

FILED
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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 335.

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

v.

COLLECTOR OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the Supreme Court of the Philippine Islands.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

THE OPINIONS IN THE COURTS BELOW.

The opinions of the Supreme Court of the Philippine Islands in this case are not yet reported in the official Philippine reports, but are reported in Volume XXVI, Philippine Official Gazette, No. 65, May 31, 1928, pp. 1712, *et seq.* They are also printed in full in the record herein, the opinion of the court at pages 26-33 and the dissenting opinions of Justice Johnson and Justice Street at pp. 40-59.

The opinion of the Court of First Instance is not reported but is printed in the record herein at pp. 13-18.

THE JURISDICTION OF THIS COURT.

This case is before this court on a writ of certiorari to the Supreme Court of the Philippine Islands granted October 22, 1928, on a petition for certiorari filed by the petitioner on August 7, 1928, under section 7 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940. The final judgment of the Supreme Court of the Philippine Islands was entered on February 9, 1928 (R. 60). The case involves the construction of section 10 of the Philippine Income Tax Law as applied to foreign corporations (the petitioner being a corporation of Spain) doing business in the Philippine Islands and in the United States, the precise question being whether income derived by the petitioner from sales "made in the United States"—of products of the Philippine Islands produced or purchased by the petitioner in the Philippine Islands and exported to the United States—is income derived from "sources within the Philippine Islands" and therefore taxable under the Philippine Income Tax Law.

STATEMENT OF THE CASE.

The petitioner, Compañia General de Tabacos de Filipinas, is a corporation of the Kingdom of Spain, duly licensed to do business in the Philippine Islands (R. 2, 8).

October 17, 1925, it filed a complaint in the Court of First Instance of the City of Manila alleging that during 1922 it had exported from the Philippine Islands *and sold in the United States* certain quantities

of sugar and tobacco at a total profit to it of 410,567.99 pesos, Philippine currency; that the defendant, as Collector of Internal Revenue, acting under the Philippine Income Tax Law, had unlawfully and illegally levied and assessed against the petitioner a tax of three per centum on such profits earned on the merchandise "exported and sold by it in the United States of America" in the sum of 12,009.75 pesos, Philippine currency; that the petitioner had paid to the respondent, under instant protest in writing, the said sum of 12,009.75 pesos; that the petitioner's protest against the tax was based upon the grounds (1) that its profits from the sugar and tobacco *sold by it in the United States* were subject to the income tax levied by the United States under the Revenue Act of 1921 as profits derived from sources within the United States by foreign corporations, and (2) that no part of those profits from the sugar and tobacco *sold by it in the United States* was derived from sources within the Philippine Islands; that the petitioner's protest against the payment of the tax was overruled and denied by the respondent, and that the respondent had refused and persisted in his refusal to return to the plaintiff the said sum of 12,009.75 pesos; and the petitioner prayed judgment for the amount so paid. (R. 2-4)

The respondent filed an answer, by the Attorney General, admitting the facts alleged in the petitioner's complaint, except with respect to the amount of the profits upon which the income tax assessed and collected from the petitioner was based, the correct amount being said to be 400,324.85 pesos (R. 4-6). This correction was accepted by the petitioner, by the filing of an amended complaint, the amended paragraph III reading as follows:

"That during the year 1922 plaintiff exported from the Philippine Islands *and sold in the United States* of America certain quantities of centrifugal sugar, manufactured tobacco, copra, and coconut oil, at a net profit to plaintiff of 400,324.85 pesos, Philippine currency."

Thereupon, an agreed statement of facts was filed which is printed at pp. 8-12 of the record herein. Paragraphs I and II recite that the plaintiff is a corporation of the Kingdom of Spain, duly licensed to do business in the Philippine Islands, and that the defendant is the duly appointed, qualified, and acting Collector of Internal Revenue of the Philippine Islands. Paragraphs III, IV, V, VI, VII, and VIII are as follows:

"III. That plaintiff is the owner of several 'haciendas,' sugar and oil mills and tobacco factories located in the Philippine Islands destined to the production or manufacture of tobacco, sugar, copra, and coconut oil for sale therein and in foreign countries; and has been and is still engaged, in the Philippine Islands, in the shipping business and in the buying and selling of tobacco, sugar, copra, and oil and in the exportation of the same, and that its business has been, and is being done mainly in the Philippine Islands.

"IV. That the Philippine branch of the plaintiff corporation on various dates during the year 1922 exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plain-

tiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of Pesos 114,226.80, Philippine currency.

"V. That, likewise, the plaintiff's Philippine branch on various dates during said year 1922, exported from the Philippine Islands a certain quantity of manufactured tobacco produced by it in the Philippine Islands which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, deriving from such transactions a profit of Pesos 296,341.19, Philippine currency.

"VI. That, likewise, the plaintiff's Philippine branch on various dates during the said year 1922, exported from the Philippine Islands a certain quantity of copra and a certain quantity of coconut oil, produced, purchased, or manufactured by it in the Philippine Islands, which were sold in the United States by the agency therein of the plaintiff's Philippine branch, such sales being likewise subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch, and that from such transactions on copra and coconut oil the plaintiff suffered losses amounting to Pesos 10,243.14, Philippine currency.

"VII. That deducting the sum of Pesos 10,243.14, the losses mentioned in Paragraph VI of this stipulation, from the sum of Pesos 410,567.99, the aggregate of the profits mentioned in Paragraphs IV and V, there remained a net profit of Pesos 400,324.85.

"VIII. That the said net profit of Pesos 400,324.85, together with other gains, profits, or in-

come were accounted for by the plaintiff on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, thereby subjecting such profits, gains, or incomes to further business deductions—management expenses, losses, etc."

Paragraphs IX, X, and XI recite that the income tax of 12,009.75 pesos was levied and assessed on the aforesaid net profits of 400,324.85 pesos, under Act 2833 (Philippine Income Tax Law) as amended by Act 2926; that the said tax was paid by the petitioner under instant protest in writing to avoid fines and penalties and distraint; that the petitioner's protest was overruled and denied, and that the respondent had refused and continued to refuse to return the amount thereof to the petitioner. Paragraph XII recited that the parties reserved the right to introduce evidence on any point not covered by the agreed statement of facts and which might be deemed material and necessary.

November 16, 1926, the Court of First Instance rendered a decision in favor of the petitioner. The opinion is printed at pp. 13-18 of the record herein.

December 6, 1927, the case was decided by the Supreme Court of the Philippine Islands, the judgment of the lower court was reversed and the complaint dismissed. The opinion is printed at pp. 20-33 of the record.

A motion for re-hearing (R. 33-39) was denied February 8, 1928 (R. 40). At this time, however, dissenting opinions were filed by Justice Johnson and Justice Street (R. 40-59), Justice Street having previously concurred in the opinion of the court and Justice Johnson having reserved his vote. Final judg-

ment for the respondent was entered on February 9, 1928. (R. 60)

SPECIFICATION OF ERRORS.

(1) The court below erred in not giving to the words "total net income received * * * from all sources within the Philippine Islands" in the Philippine Income Tax Law, the same construction applied to the similar words in the Revenue Acts of 1916 and 1918 by the Attorney General of the United States and the Commissioner of Internal Revenue.

(2) The court erred in construing the words "total net income received * * * from all *sources* within the Philippine Islands" in the Philippine Income Tax Law to mean total net income *received within* the Philippine Islands.

(3) The court erred in giving to the words "total net income received * * * from all sources within the Philippine Islands" a construction that results in subjecting foreign corporations with branch offices in the Philippine Island, exporting Philippine products to the United States, to double taxation on the income derived from the sale of such products in the United States.

(4) The court erred in giving to the words "total net income received * * * from all sources within the Philippine Islands" a construction that results in subjecting foreign corporations, doing business in the Philippine Islands, to burdens greater than those to which domestic corporations engaged in the same business are subjected.

(5) The court erred in holding that the income derived by the petitioner *from the sale in the United States* of Philippine products was income derived from "sources within the Philippine islands" upon the showing that the products were produced or purchased in the Philippine Islands, that the sales

were made in the United States by the agent of the petitioner's Philippine branch "subject to confirmation and absolute control as to price and other terms and conditions" by the petitioner's Philippine branch, and that the income was accounted for as earnings of the Philippine branch.

ARGUMENT THAT THE INCOME IN DISPUTE WAS NOT DERIVED FROM "SOURCES WITHIN THE PHILIPPINE ISLANDS" AND THEREFORE NOT TAXABLE UNDER THE PHILIPPINE INCOME TAX LAW.

As already pointed out in the statement of the case, *supra*, and as heretofore urged in the argument in support of the petition for certiorari, this case presents neatly and clearly, as it was intended to do, the question whether the income of a *foreign* corporation derived *from sales made in the United States* of Philippine products after the export of such products to the United States is income derived from "sources within the Philippine Islands" and therefore taxable under the Philippine Income Tax Law.

Upon that question the following argument is submitted, reserving for discussion under a later heading the suggestion made, for the first time, in the decision of the Supreme Court of the Philippine Islands, that under the agreed statement of facts the sales in question may be said, in fact or in law, actually to have been made in the Philippine Islands.

The following points are made:

(1) That the Philippine Income Tax Law was copied from our Revenue Act of 1916, 39 Stat. 756.

(2) That the words "total net income received • • • from all sources within the Philippine Islands"

as used in Sec. 10 of the Philippine Income Tax Law should be given the same construction that has been given to the words "total net income received * * * from all sources within the United States" in the Revenue Act of 1916.

(3) That the words "total net income received * * * from all sources within the United States" in the Revenue Act of 1916, and the similar provisions in the Revenue Acts of 1917 and 1918, have been construed by the Attorney General of the United States and the Commissioner of Internal Revenue, as applied to foreign corporations, as not including income derived from sales made abroad of products or goods exported from the United States.

(4) That this construction has been ratified and confirmed legislatively by the enactment of the Revenue Acts of 1921 and 1924 and later regulations and rulings of the Treasury Department.

(5) That, aside from its disregard of the construction of the similar language in the Revenue Act of 1916, the decision of the Supreme Court of the Philippine Islands in this case is wrong as a construction of the Philippine Income Tax Law.

(6) The construction placed upon section 10 of the Philippine Income Tax Law by the Court below is a doubtful construction which raises a serious question as to the validity of the tax law, as applied to foreign corporations, under section 3 of the Organic Act of August 29, 1916.

1. The Philippine Income Tax Law was Copied from the Revenue Act of 1916.

That the Philippine Income Tax Law, which is Act 2833, enacted March 7, 1919, Vol. 14, Public Laws, p.

221, was drawn with the Revenue Act of 1916 as a model is apparent upon a comparison of the two acts. This will doubtless be conceded by counsel for the respondent and an extended comparison of the two acts in their entirety is hardly necessary in this brief. The material parts of Section 10 of the Revenue Act of 1916, 39 Stat. 756, and Sec. 10 of the Philippine Income Tax Law (the latter as amended by Act 2926, March 20, 1920, which changed only the rate) are as follows:

"Sec. 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized but not including partnerships, a tax of two per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon *the total net income received in the preceding calendar year from all sources within the United States* by every corporation, joint-stock company or association, or insurance company organized, authorized, or existing under the laws of any foreign country, including

"Sec. 10. (a) There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company, partnership, joint-account (cuenta en participacion), association, or insurance company, organized in the Philippine Islands, no matter how created or organized, but not including duly registered general co-partnerships (companias colectivas), a tax of three per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon *the total net income received in the preceding calendar year from all sources within the Philippine Islands* by every corporation, joint-stock com-

interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, and including the income derived from dividends on capital stock or from net earnings of resident corporations, joint-stock companies or associations, or insurance companies whose net income is taxable under this title."

pany, partnership, joint-account (cuenta en participacion), association or insurance company, organized, authorized or existing under the laws of any foreign country, including interest on bonds, notes or other interest bearing obligations of residents, corporate or otherwise, and including the income derived from dividends or net profits subject to the tax established in this subsection."

Except for the substitution of the words Philippine Islands for the words United States, the language is almost identical.

2. Section 10 of the Philippine Income Tax Law Should be Given the Same Construtions as Sec. 10 of the Revenue Act of 1916, and the Similar Provisions in Later Revenue Acts.

It is a familiar rule that contemporaneous construction of a statute by those charged with its execution is entitled to great weight and should not be disregarded or overturned except when clearly erroneous.

Edwards v. Darby, 12 Wheat. 206.
Jacobs v. Pritchard, 223 U. S. 200, 213, 214.
United States v. Cerecedo Hermanos, 209 U. S. 337, 339.
First National Bank v. Missouri, 263 U. S. 640, 658.

Applying the rule to the present case, as we shall

show, the Attorney General of the United States, in a comprehensive opinion dated November 3, 1920 (32 Ops. Atty. Gen. 336), has held that the income of a foreign corporation derived from the sale abroad of merchandise purchased or produced in the United States is not derived "from sources within the United States." That opinion was accepted and followed by the Bureau of Internal Revenue, Treas. Dec. 3111, 4 Cum. Bull. p. 280. The subject was later reconsidered by the Attorney General and the former opinion confirmed on January 21, 1924 (34 Ops. Atty. Gen. 93) as applied to the Revenue Acts of 1916, 1917, and 1918. This was likewise accepted and acted upon by the Bureau of Internal Revenue, Treas. Dec. 3576, III-1 Cum. Bull. p. 211. A full discussion of these opinions and rulings will be found *post*, pages 17-20, of this brief.

It will also be observed that the Revenue Act of 1918, enacted February 24, 1919, 40 Stat. 1057, included what was in effect a legislative definition of the phrase "sources within the United States" as follows:

> "Sec. 233. * * * (b) In the case of a foreign corporation gross income includes * * * all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture *and disposition* of goods within the United States."

Later, in the Revenue Acts of 1921 and 1924, certain changes were made in the law with respect to the taxable income of foreign corporations, as hereinafter explained, *post*, pp. 20-24, but the construction placed on the provision in question, so far as it dealt with goods *purchased* in the United States and sold abroad, was expressly adhered to and ratified.

These rulings of the Attorney General and the approved policy of the Bureau of Internal Revenue, and the legislative ratification thereof by Congress, were all called to the attention of the Supreme Court of the Philippine Islands and disregarded by it in its decision in the present case. It was plainly that Court's duty to accept the construction placed upon Sec. 10 by the Attorney General and the Treasury Department of the United States and its failure to do so—or rather its deliberate adoption of a view diametrically opposed to that adopted in the United States—was error which should be corrected.

The following quotation from Justice Street's dissenting opinion is directly in point:

> "In dealing with a statute adopted by the Philippine Legislature from an Act of Congress we should be careful to take the law with the interpretation placed upon it by competent authority in the United States; and special care should be taken about this in dealing with the intricate matters covered by the income tax laws. Our endeavor should be to cooperate, as far as possible, with the Revenue Department of the United States, in making the operation of these laws just and uniform.
>
> "The opinions of the Attorney General of the United States to which reference has been made sustain the proposition that when merchandise is purchased or produced in one country and sold in another, the place of sale is to be taken as the place of the course of income for the purpose of applying a law such as is under consideration in this case; and it will be noted that the ruling thus made arose upon facts where the conclusion reached was contrary to the interests of the Government revenue,—a circumstance which indicates that probably no strong considerations in

favor of the Government were overlooked." (Record, pp. 58-59.)

3. The Words "Total Net Income Received * * * from All Sources Within the United States" in the Revenue Act of 1916, and the Similar Provisions in the Revenue Acts of 1917 and 1918, Have Been Construed by the Attorney General of the United States and the Commissioner of Internal Revenue, as Applied to Foreign Corporations, as Not Including Income Derived from Sales Made Abroad of Products or Goods Exported from the United States.

The provisions of the Revenue Acts that foreign corporations shall be taxed upon their income "from all sources within the United States" are first found in the Revenue Act of 1916, approved September 8, 1916, c. 463, 39 Stat. 756, which provided:

> "Sec. 10. That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized but not including partnerships, a tax of two per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year *from all sources within the United States* by every corporation, joint-stock company or association, or insurance company organized, authorized, or existing under the laws of any foreign country, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, and including the income derived from dividends on capital stock or

> from net earnings of resident corporations, joint-stock companies or associations, or insurance companies whose net income is taxable under this title."

Prior to 1916, the Revenue Act of October 3, 1913, ch. 16, 38 Stat. 114, 166-181, Sec. G (a), had imposed an income tax on foreign corporations "upon the amount of net income accruing *from business transacted and capital invested within the United States.*"

The object of the change in the law effected by the Revenue Act of 1916 is said to have been to prevent foreign corporations from deriving income from the United States free of tax by virtue of a technical construction of the phrase "business transacted and capital invested" and also to prevent an undue imposition of tax when the activities and property producing the income did not take place or was not situated in the United States. Holmes, *Federal Income Taxes*, 6th Ed. 1925, pp. 395-398. In that work the author says (p. 398):

> "The intention of Congress in the 1916 and subsequent statutes seems to have been to discard the 1909 and 1913 basis of taxing nonresident aliens and foreign corporations, and to make the test of taxability the 'source' or situs of the activities or property which produces the income or from which it is derived. * * * This use of the expression 'sources within the United States' has a more sincere regard for the basic rule that the consideration for taxation is protection of life and property and that the income rightly to be levied upon to defray the burdens of the United States Government is that income which is created by activities and property protected by this Government."

The Revenue Act of 1917, approved October 3, 1917, c. 63, 40 Stat. 300, amended section 10 in some respects but the language quoted above remained unchanged.

The Revenue Act of 1918, approved February 24, 1919, c. 18, 40 Stat. 1057, provided:

> "Sec. 233. * * * (b) In the case of a foreign corporation gross income includes only the gross income from sources within the United States, including the interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, dividends from resident corporations, and including all amounts received (although paid under a contract for the sale of goods or otherwise) representing profits on the manufacture *and disposition* of goods within the United States."

With respect to the income of foreign corporations, Regulations 33 Revised (Revenue Acts of 1916 and 1917) provided:

> "Art. 64. Taxable Income.—Under section 10 of Title I of the Act of September 8, 1916, as amended, a tax of 2 per cent shall be levied, assessed, collected and paid annually upon the total net income received in the preceding calendar year, from all sources within the United States, by every corporation, joint-stock company or association or insurance company organized, authorized, or existing under the laws of any foreign country.
>
> Art. 65. War Income Tax.—The additional tax of 4 per cent on net income imposed by the Act of October 3, 1917, shall apply to foreign corporations in the same manner as in the cases of domestic corporations, except that it shall apply only to income received from sources within the United States.
>
> Art. 66, Par. 309. Sources Within the United States.—It is not necessary that the foreign cor-

poration shall be engaged in business in this country or that it have an office, branch, or agency in the United States. Liability to the tax attaches with respect to the income, the source of which is in the United States.

Par. 310. 'Source' as here used means the place of the origin of the income."

Regulations 45 (Act of 1918) provided:

Art. 503. Every corporation, domestic, or foreign, not exempt under section 231 of the statute, is liable to the tax. It makes no difference that a domestic corporation may receive no income from sources within the United States. On the other hand, a foreign corporation is taxed only on its income from sources within the United States. See sec. 233 of the statute and article 550. For what the term 'corporation' includes and for the difference between domestic and foreign corporations see section 1 and Articles 1501-1509.

* * * * * * * *

Art. 550. The gross income of a foreign corporation, including an insurance company, means its gross income from sources within the United States, as defined and described in articles 91-93 relating to nonresident alien individuals. The income from business relating to a foreign country which is transacted by a United States branch or agency of a foreign insurance company must be returned as gross income."

August 12, 1920, the Secretary of the Treasury made a request on the Attorney General for an opinion whether, under the Revenue Act of 1918, in five specific cases, certain foreign corporations and partnerships derived income from sources within the United States. The Attorney General's opinion was rendered November 3, 1920, 32 Ops. Atty. Gen. 336. The five cases summarized are as follows:

A corporation of Scotland manufactures or partially manufactures articles in this country which are exported to Glasgow where they are finished at the home mill and sold in England. There is no gross income from sources within the United States within the meaning of the Revenue Act of 1918. Also, the income which may accrue to such corporation in England by the sale in England of logs purchased in the United States is not income from sources within the United States.

Where a corporation in England purchases goods in England and sells them in the United States through a New York corporation, the gross income from such business is income from sources within the United States and is to be estimated in the same way that such income is estimated where both manufacture and sale are had within the United States.

Where an English partnership, whose principal office is at Liverpool, maintains a branch office at Dallas, Texas, which does not make any sales but buys cotton in the United States and ships it to the home office in England for disposition, the gross income from such business is not derived from sources within the United States.

An English partnership having its home office in London maintains a branch office in New York City, in charge of a resident member of the firm in that City. The firm deals in raw furs and its income is derived from commissions on the proceeds from sales of furs consigned to it. The principal function of the New York office is to solicit consignments to the firm at London. Only the income of the partner resident within the United States is taxable.

An English corporation operates a line of steamships between Philadelphia and foreign ports. It has no office in the United States, but consigns its ships to agents at Philadelphia who see to the entry and clearance of the ships and the discharge

and loading of cargoes and supplies, collect such part of the freight as is pre-payable in this country, deduct the agents' disbursements and charges, and remit the balance to the company upon the departure of the vessel. The corporation derives income from sources within the United States on the freight and passenger traffic originating within the United States.

In considering the first case, the Attorney General said:

"No income is derived from the mere manufacture of goods; before there can be income there must be sale; and there is no income from sources within the United States from goods manufactured here unless there is, in the language of section 233 (b), both 'manufacture and disposition of goods within the United States.' The obvious purpose of this section is to tax only income that accrues within the United States. Congress does not attempt to tax profits arising from goods manufactured in this country but sold after being shipped abroad and without being disposed of by the owner in this country. I conclude, therefore, that when Burleigh & Sons manufacture or partially manufacture articles in this country but do not sell or dispose of them until they are taken to Scotland, there is no gross income from sources within the United States within the meaning of the Act."

* * * * * * * *

"By a parity of reasoning I conclude that income which may accrue to Burleigh & Sons in England by sale of logs purchased in the United States is not income from sources within the United States."

The opinion of the Attorney General of November 3, 1920, was adopted and promulgated by the Secre-

tary of the Treasury, in Treas. Dec. 3111, 4 Cum. Bull. p. 280.

July 26, 1923, the Secretary of the Treasury again requested an opinion of the Attorney General with respect to the construction of the Revenue Acts of 1916, 1917, and 1918, as affecting taxation of foreign corporations, in particular, foreign steamship companies in this country. The Attorney General, in an opinion dated January 21, 1924, 34 Ops Atty. Gen. 93, replied that in his opinion, after full consideration, the former opinion of November 3, 1920, is a correct and true interpretation of the Revenue Acts of 1916, 1917, and 1918, with respect to the net income received from all sources within the United States by every foreign corporation, and in particular, by foreign steamship companies.

The Attorney General's opinion of January 21, 1924, was adopted and promulgated by the Secretary of the Treasury in Treas. Dec. 3576, III-1 Cum. Bull. p. 211.

4. The Construction Placed Upon Sec. 10 of the Revenue Act of 1916 (and the Similar Provision in the Act of 1918) by the Attorney General and the Treasury Deparment has been Ratified by the Enactment of the Revenue Acts of 1921 and 1924.

It is clear, upon consideration of the opinions of the Attorney General and the rulings of the Treasury Department, cited *supra*, which as authorities are persuasive in the highest degree, that under the Revenue Acts of 1916, 1917, and 1918 the *manufacture, production*, or *purchase* in the United States by foreign corporations of goods for export and sale abroad are not to be considered as factors in determining the *source* of income.

When the Revenue Act of 1921 was under consideration before its enactment, this rule was criticised by economists on the ground that a law which permitted goods to be *manufactured* or *produced* in the United States by foreign corporations and sold abroad, without liability for the income tax, was economically unsound in that no consideration was given to the fact that the profits of an agricultural or manufacturing business might be due to two practically indivisible factors, (1) efficient producing or manufacturing, and (2) efficient marketing. *Senate Report* 275, 67th Congress, 1st Session.

To meet these objections and criticisms, the Revenue Act of 1921 provided a new method of ascertaining the income of aliens and foreign corporations from sources within and without the United States, in effect creating a new kind of income—income from "sources *partly within* and *partly without* the United States"—and enabling the Government for the first time to tax a part of the gains derived by foreign corporations from sales abroad of goods *produced* or *manufactured* in the United States.

No objection, however, was raised to the rulings under the Acts of 1916, 1917, and 1918, that income derived from the *purchase* of personal property within and its sale without the United States should be treated as derived entirely from the country in which sold, and accordingly the amendments were not drawn to cover the purchase in the United States of goods to be sold abroad. In fact, the rulings were carried into the Act of 1921 (see subsection (e) of Section 217, *post*), and later into the Act of 1924.

The Revenue Act of 1921, c. 136, 42 Stat. 227, provided:

"Sec. 233. * * * (b) In the case of a foreign corporation, gross income means only gross income from sources within the United States, determined (except in the case of insurance companies subject to the tax imposed by sections 243 or 246) in the manner provided in Sec. 217."

"Sec. 217. (a) That in the case of a non-resident alien individual or of a citizen entitled to the benefits of section 262, the following items of gross income shall be treated as income from sources within the United States: * * *

[Including, with certain exceptions, interest on United States obligations, dividends from United States sources, compensation for services performed in the United States, rentals or royalties from property in the United States, profits from sales of real estate in the United States.]

"(b) From the items of gross income specified in subdivision (a) there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the United States."

"(c) The following items of gross income shall be treated as income from sources without the United States: * * *

[Interest, dividends, compensation, rentals, and profits similar to those specified in subdivision (a) but derived from sources without the United States.]

"(d) From the items of gross income specified in subdivision (c) there shall be deducted the expenses, losses, and other deductions properly ap-

portioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which can not definitely be allocated to some item or class of gross income. The remainder, if any, shall be treated in full as net income from sources without the United States.

"(e) Items of gross income, expenses, losses and deductions, other than those specified in subdivisions (a) and (c), shall be allocated or apportioned to sources within or without the United States under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

* * * * * * * *

"Gains, profits and income derived from the purchase of personal property within and its sale without the United States or from the purchase of personal property without and its sale within the United States, shall be treated as derived entirely from the country in which sold."

Regulations 62 (1921 Act) provided:

"Art. 550, Gross Income of Foreign Corporations.—The gross income of a foreign corporation, including a mutual insurance company, means its gross income from sources within the United States, as defined and described in section 217 and Articles 316-328 relating to nonresident alien individuals. As to other foreign insurance companies, see Art. 687. See also Art. 541."

"Art. 316, Income from Sources within the United States.—Nonresident alien individuals, foreign corporations, and citizens of the United States or domestic corporations entitled to the benefits of section 262 are taxable only upon income from sources within the United States. See sections 213 (c), 233 (b), and 262.

"The statute divides the income of such taxpay-

ers into three classes: (1) Income which is derived in full from sources within the United States; (2) income which is derived in full from sources without the United States; and (3) income which is derived partly from sources within and partly from sources without the United States. The taxable income includes that derived in full from sources within the United States and that portion of the income which is derived partly from sources within and partly from sources without the United States which is allocated or apportioned to sources within the United States."

"Art. 323, Sale of Personal Property.—Income derived from the purchase and sale of personal property shall be treated as derived entirely from the country in which sold. The word 'sold' includes 'exchanged' and ordinarily means the place where marketed. This article does not apply to income from the sale of personal property produced (in whole or in part) by the taxpayer within and sold without the United States or produced (in whole or in part) by the taxpayer without and sold within the United States. See article 327 (b)."

5. The Decision of the Supreme Court of the Philippine Islands in This Case is Wrong as a Construction of the Philippine Income Tax Law, Aside from Its Disregard of the Construction of the Similar Language in the Revenue Act of 1916.

This case was tried first in the Court of First Instance of Manila and decided in favor of the petitioner. The decision of Judge Del Rosario is printed at pp. 15-18 of the Record. As heretofore stated, the case was intended to present neatly the question whether the income of a foreign corporation, derived from sales made in the United States of Philippine

products after the export of such products to the United States, is income derived from "sources within the Philippine Islands" and therefore taxable under the Philippine Income Tax Law.

As stated in the decision of the Court of First Instance (R. 15) counsel for the defendant, the Collector of Internal Revenue, contended that the income in dispute was obtained from articles which were *produced, manufactured* or *purchased* in the Philippine Islands, the sales of which, *although made in the United States,* were subject to confirmation and under the control of the petitioner's branch office at Manilla, and that therefore the profits realized were "from sources within the Philippine Islands."

This argument, which confuses the source of a product with the source of income, was likewise adopted by the Supreme Court of the Philippine Islands, which said in its opinion (R. 29):

> "That is to say, the income in question was derived and received from the plaintiff *from the exclusive products of the Phillippine Islands* which were purchased or produced by and through its branch office in the Philippine Islands and which it shipped from the Islands to the United States, where such products were sold in the identical condition in which they were shipped from the Philippine Islands. Hence, it must follow that the net income of the plaintiff as to such products was from sources within the Philippine Islands *where the products were purchased or produced,* and where the plaintiff maintains its branch office for that specific purpose."

The fallacy of this reasoning lies in the assumption that the origin of the *product* determines the origin or source of the *income* or profit earned when

that product is sold, within the meaning of an income tax law containing language such as that of section 10 of the Philippine Income Tax Law or section 10 of the Revenue Act of 1916. The Court of First Instance detected this fallacy and disposed of this argument without difficulty, saying (R. 15-16):

> "While the goods and merchandise mentioned in the agreed statement of facts are considered as sources of income, because it is from them, once sold, exchanged or assigned in payment of a debt, that the incomes proceed, yet said source must be considered remote for the purposes of the assessment of the tax provided in the section of said law which virtually makes a distinction, according as the merchandise has been sold in these Islands or outside thereof.
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> . . . . . .
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> "The true source of income received by the plaintiff corporation, for the purposes of the application of the law, is not the merchandise itself, but the transaction made concerning it, because so long as the merchandise is not placed on the market and remains stored or deposited in these Islands, they cannot mean any real income, nor net income subject to tax."
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> . . . . . .
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> "If the goods mentioned, although produced in these Islands, could not have been converted into cash or receipts representing income but after they are sold in the United States, the income that must be subject to tax, according to said law, was derived from sources which are not within the Philippine Islands, but in the United States, because said sources are not the *goods* produced here, but the *sale* thereof made in America."

The word "sources" as applied to taxable income conveys one idea—the idea of origin. It has been defined by the Treasury Department in Regulations 33 Revised, Art. 66 (Revenue Acts of 1916 and 1917):

> "Par. 310: Source as here used means the place of the origin of the income."

It has also been defined in Office Dec. 651, 3 Cum. Bull. 265, as follows:

> "The source of income means the place of origin, and is not restricted to the place where payment is made, since the place of payment may be arbitrarily selected without relation to the nature of the transaction and is not indicative of the source. Where the income grows out of a business activity in the United States, it is immaterial where actual payment is made."

This court has said that income may be derived from three sources, from capital and or labor and from sale of capital assets. *Stratton's Independence v. Howbert*, 231 U. S. 399, 415; *Doyle v. Mitchell*, 247 U. S. 179, 185; *Eisner v. Macomber*, 252 U. S. 189.

If these are the sources of income, it follows necessarily that in determining whether a particular item of income is from sources within the United States or, as in this case, from sources within the Philippine Islands, we must inquire into the nature and location of the activities or property which produced the income. If the income is from labor or services, the place where the labor or services are performed is decisive; if in the United States the income is from sources within the United States. If the income is from capital, the place where the capital is employed

is decisive; if it is employed in the United States the income is from sources within the United States. If the income is from sale of capital assets, the place where the sale is actually made determines the source of the income. Holmes, *Federal Income Taxes*, 6th Ed. 1925, p. 396.

The income of a corporation engaged in the production or purchase of tobacco, sugar, copra and oil, for sale outside the Philippine Islands, such as petitioner herein, is due to a series of transactions beginning with the decision of petitioner's executive officers in the Philippine Islands to buy or produce tobacco, sugar, copra, or oil; the actual purchase or production of the same; the shipment of these products to the United States and their storage there until sold; the efforts of petitioner's agency in the United States to find a prospective customer; the negotiations with the customer when found; the agreement on terms and prices; the confirmation and ratification by the Manila office; the communication thereof to the purchaser and the delivery and acceptance of the products sold; the collection of the purchase price; the transfer of the proceeds to the petitioner's Philippine branch; and the entry of the income made thereby, in the books of account of petitioner's Philippine branch.

By a forced construction, each and all of these diverse activities may be considered the source or origin of petitioner's income, since if one of these steps were omitted there would necessarily be no income forthcoming. Indeed, we may even go back and assign the original decision of the petitioner's directors in Spain to establish a branch office in the Philippine Islands as the source of petitioner's income, or we may take into consideration the fact that all the income received by

the petitioner in the Philippine Islands eventually finds its way to Spain, where the main office of petitioner is located, and is accounted for in account books kept by the petitioner in that country.

It is respectfully submitted, however, that such is not the sense in which the term "source" is used in section 10 of Act 2833 of the Philippine Legislature, as amended. As used therein, the income of petitioner from a single transaction has only one source, and if that source be in the United States it cannot at the same time be in the Philippine Islands or elsewhere. Out of these multitudinous activities, that should be selected which brings the income from petitioner's property to fruition, and wherever that transaction was consummated, in that place lies the source of petitioner's income. A different construction such as that adopted by the lower court would wipe out the distinction made in the law with regard to the basis upon which the incomes of domestic and foreign corporations are to be taxed, for there can not possibly be a transaction effected in another jurisdiction by a foreign corporation doing business in the Philippine Islands which cannot be linked in some way with a previous or subsequent transaction, the situs of which is in the Philippine Islands.

The fact that these products are *exported* by the petitioner from the Philippine Islands to the United States *for sale in the United States* by the petitioner's agents, cannot be avoided. When they effect sales at prices acceptable to the petitioner, the profits thus realized are derived from sources within the United States and not from sources within the Philippine Islands.

The construction we urge is a construction which

avoids double taxation and which should have been adopted by the Supreme Court of the Philippine Islands, even without regard to the construction placed upon the similar language in our Revenue acts. As stated by the author of a well-known work on income taxes (Holmes, *Federal Income Taxes*, 6th Ed. 1925, at p. 298):

> "The complications of international taxation are so manifold and the burden of double taxation is often so heavy that it is no exaggeration to call the 1916 and subsequent laws emphasizing the source of income as the test of taxability a long step in advance towards international comity in taxation. The evil of double taxation as between the states of this country was deprecated by Mr. Justice Holmes in *Kidd v. Alabama*, 188 U. S. 730, at p. 732, where he said: 'No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided."

While there is nothing in the law in the Philippine Islands or in the United States prohibiting double taxation, or the taxation of income which is already taxed elsewhere, such taxation is contrary to all sound principles, is inherently unjust and unfair, and "ought, wherever possible, to be prevented." *Buck v. Beach*, 206 U. S. 392, 408.

It can be prevented by giving to the phrase "sources within the Philippine Islands" used in the Philippine Income Tax Law, its natural, ordinary, and familiar meaning, sanctioned and adopted in the rulings of the Attorney General and the Treasury Department of the United States.

In the decision of the Supreme Court of the Philippine Islands it is said (R. 28) that apparently the purpose and intent of the Legislature was that a foreign corporation engaged in business in the Philippine Islands should pay the same rate of tax as a domestic corporation, otherwise the foreign corporation would have an advantage over the domestic corporation engaged in the same business. And again (R. 31) that our contention, if sustained, would give a preference to a foreign corporation doing business in the Philippine Islands over a domestic corporation engaged in the same business, to the amount of the three per cent tax upon the income in question.

On the contrary, the result is grossly unfair to foreign corporations doing business in the Philippine Islands, if the construction placed on section 10 by the Supreme Court of the Philippine Islands be allowed to stand. The difference in the deductions granted to domestic corporations and foreign corporations would not correspond to or bear any reasonable relation to the difference in tax. A domestic corporation may deduct from its gross income all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and property, including rentals pertaining to its agency in the United States. A foreign corporation, however, is limited to the deduction of its expenses in connection with its business and property, including rentals for such property, *within the Philippine Islands.*

This results from the provisions of the first paragraph of Sec. 12, paragraphs (a) and (b) of the Philippine Income Tax Laws, quoted on p. 33 of the brief filed in support of the petition for certiorari.

6. The Construction Placed Upon Section 10 of the Philippine Income Tax Law by the Court Below is a Doubtful Construction Which Raises a Serious Question as to the Validity of the Tax Law, as Applied to Foreign Corporations, Under Section 3 of the Organic Act of August 29, 1916.

Section 3 of the Organic Act of August 29, 1916, c. 416, 39 Stat. 545, guarantees to all persons in the Philippine Islands, including corporations, the equal protection of the laws, also that the rule of taxation in said Islands shall be uniform. If this income tax law is to be construed as the court below has construed it, the result is not only grossly unfair to foreign corporations doing business in the Philippine Islands in competition with local corporations, but in effect denies to such foreign corporations the equal protection of the laws. The petitioner, being admitted to do business in the Philippine Islands, is entitled to carry on such business on equal terms with local corporations and to enjoy the same rights, subject to the same burdens, as are enjoyed and imposed upon all other persons in like situation. It may not be arbitrarily discriminated against without any real or substantial basis therefor.

Southern Ry. Co. v. Greene, 216 U. S. 400
Hanover Fire Insurance Co. v. Carr, 272 U. S. 494
Compania General de Tabacos de Filipinas v. Collector, 275 U. S. 87.

That there is serious doubt as to the validity of section 10 of the Philippine Income Tax Law as construed by the court below, in view of the provisions with respect to deductions set out in paragraphs (a)

and (b) of Sec. 12 of the same law (set out in parallel columns on page 33 of the brief filed in support of the petition for certiorari herein) is well pointed out in the dissenting opinion of Justice Johnson (R. 57-58) as follows:

> "If the doctrine of the majority opinion is the correct interpretation of the law, then domestic and foreign corporations are subjected to unequal burden in accordance with the provisions of paragraphs (a) and (b) of section 12 of the Act 2833. Their allowable deductions are not the same.
>
> "It is well established that a state, or territory authorized to legislate for itself, may regulate the activities of foreign corporations within the state or such territory, but it cannot regulate or interfere with what foreign corporations may do outside.
>
> "The plaintiff was authorized, through its branch office, to do business in the Philippine Islands. **If it chose to do business outside of the** Philippine Islands it had a perfect right to do so and the Philippine Legislature has no authority to place a burden upon the business done outside of the Philippine Islands."

[Citing *Allgeyer v. Louisiana*, 165 U. S. 578; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346; *Compania General de Tabacos de Filipinas v. Collector, supra.*]

That where there is any doubt as to the proper construction to be placed upon legislation that construction should be adopted which avoids any doubt as to its constitutionality is a familiar rule of construction. *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 407-408; *Matthew Addy Co. v. United States*, 264 U. S. 239-245.

UPON THE AGREED STATEMENT OF FACTS THE SALES FROM WHICH THE INCOME IN DISPUTE WAS DERIVED MUST BE HELD TO HAVE BEEN MADE IN THE UNITED STATES.

As heretofore stated, this case was intended to settle the question whether the income of a *foreign* corporation derived *from sales made in the United States* of Philippine products after the export of such products to the United States is income derived from "sources within the Philippine Islands" and therefore taxable under the Philippine Income Tax Law.

In the decision of the Supreme Court of the Philippine Islands the suggestion is made, apparently as an aid to the conclusion reached, that upon the agreed statement of facts the sales in question may be said, in fact or in law, actually to have been made in the Philippine Islands. This suggestion was adopted by counsel for the respondent in the brief filed herein in opposition to the petition for certiorari.

Paragraph IV of the agreed statement of facts recites (R. 9):

> "That the Philippine branch of the plaintiff corporation on various dates during the year 1922 *exported from the Philippine Islands* a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and *which was sold in the United States* by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of Pesos 114,226.80, Philippine currency."

Paragraphs V and VI are similar to paragraph IV. It is also recited in paragraph VIII (R. 11) that the net profit in question, with other gains, profits or income, was accounted for on the plaintiff's books of account kept in the Philippine Islands as earnings made by and accruing to the Philippine branch.

In the decision of the court below, the court calls attention to the stipulation that the sales were subject to confirmation in Manila of price, terms, and conditions, and that the earnings were accounted for on the books of account kept at Manila, and says:

> "In other words, no sale was actually consummated until after it was ratified and approved by the local branch, and all profits or incomes from such sales were accounted for by the plaintiff on its books kept in the Philippine Islands as earnings made by and accruing to the Philippine branch."

Again, later in the opinion (R. 32) the court says:

> "In the instant case, the record is conclusive that all of the sources of plaintiff's income in question had their origin in or were derived from its branch office in the Philippine Islands by and through the products of the Philippine Islands, which were purchased or produced by its branch office in the Philippine Islands, and that all of the sales in question were made through its branch office, and that no sale was actually consummated until such time as it was approved by the branch office both as to terms and conditions, and that an account of all such sales made in the United States was rendered to the branch office, together with the proceeds, where a full and complete record was kept and made of all of such transactions."

These two quotations contain all that is said in the decision of the court below to the effect that these sales must be held, in fact or in law, actually to have been made in the Philippine Islands.

Counsel for the respondent has used this language as a basis for the argument in the brief filed in opposition to the petition for certiorari, that the only question in this case is whether the sales were made in the Philippine Islands or in the United States, and that upon that question the court below has made a finding —as a finding of ultimate facts—that the sales were actually made in the Philippine Islands, and that that finding should not be disturbed by this court.

On the contrary, the whole opinion of the court below shows beyond any question that the actual ground of decision was the same ground on which the case had been defended in the Court of First Instance and was defended in the Supreme Court of the Philippine Islands.

Immediately following the remark that no sale was actually consummated until after ratification by the local branch, the court below continues (R. 29) that it is further stipulated that the products in question were exclusively the products of the Philippine Islands from whence they were shipped to the United States and there sold in the same form and condition as when they were shipped from the Philippine Islands, and then says:

> "That is to say, the income in question was derived and received by the plaintiff *from the exclusive products of the Philippine Islands* which were purchased or produced by and through its branch office in the Philippine Islands and which it shipped from the Islands to the United States,

> where such products were sold in the identical condition in which they were shipped from the Philippine Islands. Hence, it must follow that the net income of the plaintiff as to such products was from 'sources within the Philippine Islands' *where the products were purchased or produced* and where the plaintiff maintains its branch office for that specific purpose."

The fallacy of this reasoning, which confuses the source of a product with the source of income and assumes that the origin of the product determines the origin or source of the income or profit earned when that product is sold, is demonstrated in the decision of the Court of First Instance quoted, *supra*, p. 26, and the argument heretofore submitted in this brief, pages 24-31. Also in the dissenting opinion of Justice Johnson of the Supreme Court of the Philippine Islands (R. 40-58).

Assuming that title did not pass to the purchasers until after ratification of the sales by the Manila office, the sales were no less made in the United States. "A contract of sale is considered as made at the place where the transaction is finally consummated by delivery and acceptance." 35 Cyc. 94. These products were physically in the United States when the sales were made and were delivered and accepted in the United States. There was no executed contract of sale until delivery was made and accepted.

This suggestion in the opinion of the court below with respect to the place of sale is well answered by Justice Johnson in his dissenting opinion (R. 53-56) in part as follows:

> "From the foregoing we are led to the question where were the merchandise involved in this question sold? We find the answer to that question

(1) in the stipulated facts (paragraphs 4, 5, 6 of the stipulated facts), and (2) in the brief of the Attorney-General (p. 6). Said paragraphs of the stipulated facts expressly provide that the merchandise from which the income in question arose 'was sold in the United States.' The Attorney-General in his brief, at page 6, also makes the statement that: 'It is true that the sale of the articles was made in the United States.' In our opinion it would be a great injustice to the appellee if the stipulation presented at the beginning of the trial and the admission of the Attorney-General after the trial should be construed now to the prejudice of the appellee. We do not believe, in view of said stipulation and admitted fact by the Attorney-General, that any question should be raised at this time as to the place of the sale. The question of the place of the sale has been admitted to be in the United States.

It is argued, however, in the majority opinion that inasmuch as the sale was by an agent in the United States, 'the sale being subject to confirmation, etc., as to price and other terms and conditions,' that the sale was not made in the United States according to the stipulated facts, but was made in fact in the Philippine Islands. We cannot give our assent to that argument. The sale took place, by agreement of the parties, where the goods were, in the United States at the time of the sale.

In effect the act has also been construed by the court below as imposing a tax on the income of a foreign corporation *received within* the Philippine Islands. The law does not say that. The law says "income received from *sources* within the Philippine Islands." The remittance of the purchase money to Manila is immaterial. The court below has undertaken to amend the law—not to construe it.

Compare the decision of the Board of Tax Appeals

in the case of *Standard Marine Insurance Co., Ltd.*, 4 B. T. A. 853, where it was held that the interest on Anglo-French bonds and British bonds owned by a foreign corporation but held in the United States by its United States branch, the interest being paid in the United States to the United States branch, is not income from sources within the United States under the Revenue Act of 1918. Compare, also, the ruling of the Bureau of Internal Revenue, 3 Cum. Bull. 265, quoted, *supra*, p. 27, that the source of income is not restricted to the place where payment is made, as the place of payment may be arbitrarily selected without relation to the nature of the transaction and is not indicative of the source.

Nor does not the fact that final ratification of the sales had to be made in Manila transform the sales actually made in the United States into sales made in the Philippine Islands. Ratification is inherent in most sales made through agents and does not change the place of sale for the purpose of taxation. These products were admittedly exported from the Philippine Islands to the United States, were physically in the United States, the petitioner's agents who sought and found purchasers and effected the sales were in the United States, the purchasers were in the United States, delivery was made and accepted in the United States. It would be doing violence to the admitted facts, as well as to the stipulation of the parties, to conclude—as the court below is said to have concluded—that the necessity of ratification by the Manila office of the price and terms and conditions of sale had the effect—notwithstanding the stipulation of the

parties—of making the place of sale for the purpose of taxation in Manila.

Respectfully submitted,

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FILE
FEB 28 1
CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 335

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

v.

COLLECTOR OF INTERNAL REVENUE,
Respondent.

RESPONDENT'S BRIEF ON HEARING OF WRIT OF CERTIORARI

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I.

Respondent's brief in opposition to the petition for certiorari is believed substantially to cover the case. It is requested that it may stand as respondent's brief on the hearing, with these additions.

II.

1. Petitioner's brief is almost wholly devoted to questions that are not in the case. Only pages 34 to 40 are directed to the discussion of the only pertinent question, viz., whether or not the sales here in question were "made" in the Philippine Islands, or in the United States.

2. Petitioner's counsel states that it was the intention of this case to present "neatly" the (assumed) question of whether income derived from "sales made within the United States" was to be included in the computation of income of

such foreign corporations "derived from sources within the Philippine Islands." (Petitioner's brief, p. 8, and pp. 2, 34).

And, under the heading, "**The Jurisdiction of this Court**", *petitioner wholly misstates the question at issue*, saying (petitioner's brief, p. 2):

> "the precise question being whether income derived by the petitioner from sales 'made in the United States' * * * is income derived from 'sources within the Philippine Islands' and therefore taxable under the Philippine tax law."

But there is no such question in this case.

Respondent categorically admits that income derived by a foreign corporation doing business in the Philippine Islands, such as this petitioner (Spanish corporation with a branch in the Philippines; "Agreed Statement of Facts", Par. I, p. 8), *from sales actually "made" in the continental United States, is not income derived "from sources within the Philippine Islands"; and, therefore, is not taxable under the Philippine income tax law here in question.*

There is no question about that. Respondent has never contended that income from sales actually made in the United States is subject to the Philippine income tax law.

The practical question in the case, and the question that respondent understands was intended to be presented, and that is a question of interest to the Philippine business community, not only to this particular petitioner, but also to others, is: Whether or not, under such circumstances as those shown here,

> —where foreign corporations, doing business in the Philippines, send merchandise from Manila to the continental United States to agents here of their Manila branches, with directions to negotiate sales subject to approval and ratification in Manila, and sales are so negotiated, and are so approved in Manila, and, pursuant to such approval, the agents, here in the continental United States, deliver the goods, collect the proceeds, and remit the proceeds to Manila,—

under such circumstances, the sales are to be considered as sales made in the Philippines, and so subject to the Philippine

income tax law as upon income derived "from sources within the Philippine Islands"; or, on the other hand, are such sales to be considered as sales actually "made" here in the continental United States, so that the income so derived therefrom by the Philippine branches of such foreign corporations doing business in Manila is not to be treated as income derived from "sources within the Philippine Islands", and, hence, as not subject to the Philippine income tax law.

That, as respondent understands it, is the question presented by this record; and, on the merits, is the real question in the case.

To repeat, the whole question is whether in these cases these particular sales were or were not "made" in the Philippine Islands. If they were, then, of course, the income therefrom derived is income derived from "sources within the Philippine Islands." On the other hand, if the sales are to be considered as "made" in the United States, then, equally of course, the income therefrom is not income derived from sources within the Philippine Islands.

That is all there is to it.

Where the sales were "made" is the decisive question in the case.

On that question counsel cite no decisions. They do not even suggest that there are decisions contrary to those cited by respondent.

III.

1. The power and duty of the Insular Supreme Court to interpret and determine the meaning to be given to the "agreed statement of facts" filed in the Court of First Instance (R. 8-12) in accordance with local procedure, is akin to its power and duty to interpret and determine the meaning to be given to acts of the local legislature.

This court will not disturb the interpretation so given to the stipulation by the Territorial Supreme Court, unless "clearly erroneous", for like reasons as those because of which it does not disturb the local interpretation of local acts of the legislature, viz., that in each case the local Territorial Supreme Court, familiar with local habits and conditions, is in better

position to put itself into the shoes of the parties using the language than is this court.[1]

2. And, in any event, the Philippine Supreme Court's interpretation of the stipulation is not only manifestly *not* "clearly erroneous"; but, on the contrary, is the right interpretation, on the face of the language used.

3. Of course, the stipulation was intended to be, and is to be treated as, a stipulation of *facts*. It is the *facts* stated which bind the parties and the court in considering this case. And only the facts; not conclusions of law that might be inferred from particular words used. And so the Insular court was clearly right in declining to pick out of its context, and give a technical interpretation to, the phrase "sold in the United States" (paragraphs IV, V and VI, "Agreed Statement of Facts," R. 9, 10); which would have negatived the conclusion to be drawn, on the whole stipulation, from the facts (otherwise) clearly stated by the parties.

4. Taking the *facts* alone, as they appear in this "Agreed Statement" (R. 8–12),—and disregarding, as the Insular Court rightly did, any conflicting conclusions that might have been drawn from a technical interpretation of the words "sold" and "sale" ineptly used by the draftsman,—then it clearly appears that paragraphs IV, V, and VI of the stipulation clearly mean, simply, just as interpreted by the Insular Supreme Court:

> That the Philippine branch of the plaintiff corporation, on various dates during the year 1922, sent certain merchandise (sugar, Par. "IV"; tobacco, Par. "V"; copra and coconut oil, Par. "VI") from the Philippine Islands to the continental United States; that its agency here in the continental United States negotiated sales from time to time, "subject to confirmation and absolute control as

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1 This court has repeatedly said that it does not disturb the judgments of territorial courts of last resort upon questions of local procedural law, any more than upon other questions of local law. *Sweeney* vs. *Lomme*, 89 U. S. 208, 213; *Fox* vs. *Haarstick*, 156 U. S. 674, 679; *Copper Queen Mining Co.* vs. *Arizona Board of Equalization*, 206 U. S. 474, 479; *Alton* vs. *Johnson*, 231 U. S. 106, 110; *Ibanez* vs. *Hong Kong, etc., Bkg. Corp.*, 246 U. S. 621, 627; *Fiemister* vs. *United States*, 207 U. S. 372, 375; *Dowdell* vs. *United States*, 221 U. S. 325, 327–329.

to price and other terms and conditions thereof, by the plaintiff's Philippine branch";

that (*inferentially*), after such confirmation in the Philippine Islands, the agency in the continental United States delivered the goods, and sent the proceeds to plaintiff's Philippine branch; and that, upon the aggregate of such transactions for that year, the plaintiff's Philippine branch realized a net profit of ₱400,324.85, upon which the Collector levied the 3% income tax here in question.

5. Those are the *facts* appearing in the stipulation. The Insular Supreme Court rightly interpreted it as binding the parties and the court only by those *facts;* and rightly disregarded contrary conclusions of law urged upon it by counsel, sought to be based upon a technical interpretation of the words "sold" and "sale" ineptly used by the parties.

6. Considering the *facts* as thus stated, the sales were clearly "made",—that is, *consummated,—in the Philippine Islands,* where the minds of the parties met, *by the act of plaintiff's Philippine branch approving and accepting, there, in Manila, the offers made to it* through the medium of its agency here in the United States, from time to time.

7. *That acceptance, in Manila, was the determinative act. At that moment the relations of the parties changed.*

Then, and then only, was the sale complete. Then, and then only, the relations of the parties changed. From that moment the plaintiff was no longer the owner of the goods sold. From that moment the title was in the purchaser; and, from that moment, plaintiff's agency here in the continental United States ceased to hold the goods as plaintiff's bailee, and became the bailee of the purchaser. From that moment the relation between the plaintiff and the purchaser, as to the purchase price, became the relation of creditor and debtor.

The sales were made in the Philippine Islands, and nowhere else. Petitioner cites no decisions to the contrary. The law is well settled.

This is determinative of the case.

IV.

But even if the Insular Supreme Court's decision were to be interpreted as meaning (*which it clearly does not*) that the Philippine statute authorizes income from sales, actually "made" within the continental United States, to be taken into account in levying the Insular income tax on foreign corporations doing business there; yet it by no means follows that such a construction of the Philippine statute would necessarily violate the "uniformity" clause of Section 3 of the Organic Act for the Philippine Islands, as petitioner rather faintly suggests might be the result (Petitioner's Brief, pp. 32–33).

> "Tax laws are practical undertakings. They deal with normal business enterprises. The requirement of uniformity does not extend to the utterly impractical limit of compelling mathematical or scientific equality of incidence. No property tax accomplishes that result. The owner of realty, unrented or leased to an irresponsible tenant, finds his tax a heavy burden, while his neighboring owner of property leased at a good and promptly paid rental finds the tax easy to pay. The shrewd buyer of foreign goods subject to an *ad valorem* import tax pays less tariff and thus adds to the margin between him and his less efficient competing importer. But these inequalities of result grow out of inequalities in business conditions and activities, not possible of control by law. They are unavoidable; they do not originate in the law. They are not cases of intentional and arbitrary discrimination."
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> *Sanchez Morales & Co., Inc.* v. *Gallardo, Treas.*, 18 F. (2d), 550.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 339.

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

v.

COLLECTOR OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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In the Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 335.

COMPANÍA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

v.

COLLECTOR OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion ("decision") of the Court of First Instance of the City of Manila, DEL ROSARIO, J., November 16, 1926 (R. 13–18), in favor of the petitioner, plaintiff in that court, is not officially reported.

The opinion ("decision") of the Supreme Court of the Philippine Islands (R. 20–33), December 6, 1927, in favor of the respondent, Collector of Internal Revenue, appellant in that court, reversing the judgment of the Court of First Instance, is not yet reported in the Official Philippine Reports; but is reported in Vol. XXVI, Philippine Official Gazette, No. 65, May 31, 1928, pp. 1712 *et seq.*

On February 8, 1928, the Philippine Supreme Court, without a formal opinion, overruled the petitioner Tobacco Company's petition for a rehearing (R. 40), JOHNSON and STREET, JJ., then dissenting; their dissenting opinions (R. 40–59), likewise appear in Vol. XXVI, Philippine Official Gazette, No. 65, May 31, 1928, *supra*, at pp. 1714 to 1718, immediately following the opinion of the court.

JURISDICTION

It is submitted that this court is without jurisdiction to grant the writ of certiorari in this case under Section 7 of the Act of February 13, 1925.

PETITIONER HAS NOT COMPLIED WITH THE REQUIREMENT OF RULE 27 (2) (c) OF THE REVISED RULES OF THIS COURT IN CONNECTION WITH RULE 12 (1), made applicable to this case by Rule 42 in connection with Rule 38 (2), THAT IT INCLUDE IN ITS PETITION OR BRIEF A "CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED", INCLUDING THE PARTICULAR MATTERS PRESCRIBED BY THE FIRST SECTION OF RULE 12.

NO SUCH STATEMENT APPEARS EITHER IN THE PETITION OR IN PETITIONER'S SUPPORTING BRIEF.

The substantial questions which petitioner seeks to present relate solely to the correctness of the Philippine Supreme Court's construction of a local statute of those Islands, viz., Section 10 of Act No. 2833, the Philippine Income Tax Law, as amended by Section 7 of Act No. 2926. (*Petition, "Reasons for the Allowance of the Writ"*, pp. 7–10.)

The only thing in those "Reasons" of the petitioner which might be said to present a federal question cognizable by this court under Section 7 of the Act of February 13, 1925, is (Petition, p. 9, toward the end of the statement of the second "Reason" assigned):

> The said decision of the Supreme Court of the Philippine Islands violates the uniformity clause of the Jones Law, because the difference in the deductions granted to domestic corporations and foreign corporations with branch offices in Manila will not now correspond to and

bear a reasonable relation to the difference in the base of the tax.

That, however, does not present any "substantial federal question" within the meaning of the decisons of this court, sufficient to support the jurisdiction. (See *infra*, Point I, pp. 8–10 hereof.)

Section 7 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940, provides:

> Sec. 7. That in any case in the Supreme Court of the Philippine Islands wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds $25,000, * * * it shall be competent for the Supreme Court of the United States * * * * to require, by certiorari, that the cause be certified to it for review * * * *; and, except as provided in this section, the judgments and decrees of the Supreme Court of the Philippine Islands shall not be subject to appellate review.

The amount here in controversy does not exceed $25,000. On the contrary, the tax here involved, paid under protest October 18, 1923, amounted only to ₱12009.75, Philippine currency,—that is to say, to $6004.88.

STATUTES INVOLVED

The pertinent language of Section 10 of Philippine Act No. 2833, as amended by Section 7 of Philippine Act 2926, is, as stated by the petitioner (Petition, pp. 7–8):

> "Sec. 10. (a) There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation * * * organized in the Philippine Islands, * * * a tax of three per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources within the Philippine Islands by every corporation * * * organized, authorized, or existing under the laws of any foreign country."

STATEMENT OF THE CASE

This was a suit for refund of ₱12009.75 ($6004.88) income tax, begun by the petitioner-plaintiff, in the Court of First Instance of Manila. An "Agreed Statement of Facts" was filed in that court (R. 8–12), which recites that the defendant, respondent here, is the Collector of Internal Revenue for the Philippine Islands, and that the petitioner-plaintiff is a corporation of Spain licensed to do business in the Philippine Islands and maintaining its principal office in those Islands in the City of Manila, and is the owner of several "haciendas", sugar and oil mills and tobacco factories located in the Islands "destined to the production or manufacture" of tobacco, sugar, copra, and coconut oil, for sale in the Islands and in foreign countries, and has been and is still engaged in the Philippine Islands in the shipping business and in the buying, selling and exportation of those commodities, "and that its business has been, and is being done mainly in the Philippine Islands." It then states (Par. IV, R. 9) that

> "the Philippine branch of the plaintiff corporation on various dates during the year 1922 exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of ₱114,226.80, Philippine currency";

and that (Pars. V, VI, VII, R. 10-11) it similarly sold in the same manner during the same year tobacco from which it derived a profit of ₱296,341.19, and some copra and coconut oil upon which it suffered losses amounting to ₱10,243.14. That deducting such losses on the copra and coconut oil from the profits made on the transactions in sugar and tobacco, there remained a net profit of ₱400,324.85, and that (Par. VIII, R. 11),

"the said net profit of ₱400,324.85, together with other gains, profits, or income, were accounted for by the plaintiff on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, thereby subjecting such profits, gains, or incomes to further business deductions—management expenses, losses, etc."

That on those net profits of ₱400,324.85, the defendant-respondent, Collector of Internal Revenue, assessed a tax of three per centum against the plaintiff-petitioner amounting to ₱12,009.75 ($6004.88) under the Philippine Income Tax Law, Act No. 2833, as amended by Act No. 2926; which the plaintiff paid under protest on October 18, 1923; and to recover which sum,—plaintiff's protest having been overruled by the defendant-Collector,—this suit was brought.

The ground on which the Collector assessed the tax was that, the sales being made subject to confirmation in Manila, and the income therefrom being accounted for by the plaintiff Tobacco Company on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, the sales were really consummated or "made" in Manila, and not in the United States; and, therefore, that the income therefrom is income received from "*sources within the Philippine Islands*" within the meaning of Section 10 of the Philippine Income Tax Law, Act 2833, as amended by Section 7 of Act 2926.

The Court of First Instance (DEL ROSARIO, J., R. 13-18) held for the plaintiff, and directed the tax refund. But on the Collector's appeal the judgment was reversed by the Supreme Court of the Philippine Islands (R. 20-33), which held (R. 29) that, under the circumstances recited in the "Agreed Statement of Facts",

"no sale was actually consummated until after it was ratified and approved by the local branch" (the Tobacco Company's local branch in the Philippine Islands, its principal office at Manila) "and all profits or incomes from such sales were accounted for by the plaintiff on its books kept in the Philippine Islands 'as earnings made by and accruing to the Philippine Branch'";

and that (R. 32),

> "In the instant case, the record is conclusive that all of the sources of plaintiff's income in question had their origin in or were derived from its branch office in the Philippine Islands by and through the products of the Philippine Islands, which were purchased or produced by its branch office in the Philippine Islands, and that all of the sales in question were made through its branch office, and that no sale was actually consummated until such time as it was approved by the branch office both as to terms and conditions, and that an account of all of such sales made in the United States was rendered to the branch office, together with the proceeds, where a full and complete record was kept and made of all of such transactions."

The opinion was written by Mr. Justice Johns; and Chief Justice Avanceña and Justices Street, Malcolm, Villamor, Ostrand, and Villa-Real concurred (R. 33). There was no dissent, but Mr. Justice Johnson "reserved his vote". The Tobacco Company moved for a rehearing (R. 33–39) which was denied on February 8, 1928 (R. 40), at which time, however, Justices Johnson and Street dissented and filed separate dissenting opinions (R. 40–58, and 58–59).

THE QUESTIONS

1. Is any substantial federal question here presented sufficient to sustain the jurisdiction of this court under Section 7 of the Act of February 13, 1925?

2. Should this court disturb the interpretation placed by the Philippine Supreme Court upon the stipulation or "Agreed Statement of Facts" in accordance with local procedure, and the construction of its own local statute in connection therewith, finding that, as a matter of ultimate fact, the sales in question were made in the Philippine Islands, and not in the United States; and hence that, within the meaning of the local statute as interpreted by that court, the income therefrom was derived from "sources within the Philippine Islands"?

3. In any event, was not the finding of the Philippine Supreme Court correct, that the sales here in question were made, as a matter of fact, in the Philippine Islands, and not in the United States?

SUMMARY OF RESPONDENT'S ARGUMENT

Petitioner's counsel misapprehend the decision of the Philippine Supreme Court when they say (Petition, p. 8) that:

> "The Supreme Court of the Philippine Islands has held that the words 'sources within the Philippine Islands', as applied to foreign corporations with branches in the Philippine Islands, *embraces income received from profits on sales made by such corporations of Philippine products in the United States of America.*"

THAT COURT HELD NOTHING OF THE KIND. To the contrary, it recognizes that, if the sales were really made within the United States, the income therefrom would not be taxable under the Philippine statute. It simply holds that, in the present case, upon a proper interpretation of the "Agreed Statement of Facts", the sales here in question were made in the Philippine Islands, and not in the United States.

The position of the respondent Collector is that: (1) There is here presented no substantial federal question sufficient to support the jurisdiction of this court under Section 7 of the Act of February 13, 1925. (2) The finding of the Philippine Supreme Court that, upon a true interpretation of the "Agreed Statement of Facts", the sales here in question were really "made" in the Philippine Islands, and not in the United States, and that, therefore, the income therefrom was "derived from sources within the Philippine Islands" within the meaning of the local income tax law, Act No. 2833, as amended by Act No. 2926, was *a finding of ultimate facts* by that court, *or else a finding on a mixed question of fact and of local procedural law and upon the interpretation of a local statute;* which, not appearing to be "clearly erroneous", will not be disturbed by this court. (3) In any event, the finding that the sales were consummated,—that is to say, "made",—in the Philippine Islands, and not in the United States, was right.

ARGUMENT

POINT I

THERE IS HERE PRESENTED NO SUBSTANTIAL FEDERAL QUESTION SUFFICIENT TO SUSTAIN THE JURISDICTION OF THIS COURT UNDER SECTION 7 OF THE ACT OF FEBRUARY 13, 1925.

As above pointed out ("Jurisdiction", *supra*, p. 2), petitioner nowhere either in its petition or in its supporting brief makes any definite statement of the grounds upon which it invokes the jurisdiction of this court. The amount involved, $6,004.88 (₱12009.75; R. 11, 12), is not sufficient to confer jurisdiction; and the only claim advanced by petitioner which might be said to present a federal question cognizable by this court under Section 7 of the Act of February 13, 1925, is the paragraph occurring on page 9 of its petition, towards the end of the second of its "Reasons for the Allowance of the Writ", wherein, after stating the principal proposition of such second "Reason" that (Petition, p. 8),

> "2. The Supreme Court of the Philippine Islands has held that the words 'sources within the Philippine Islands', as applied to foreign corporations with branches in the Philippine Islands embraces income received from profits on sales made by such corporations of Philippine products in the United States of America",

and after elaborating that proposition somewhat, it adds, *simply as a corollary thereto*, the statement that (Petition, p. 9, near the bottom of the page):

> "The said decision of the Supreme Court of the Philippine Islands violates the uniformity clause of the Jones Law, because the difference in the deductions granted to domestic corporations and foreign corporations with branch offices in Manila will not now correspond to and bear a reasonable relation to the difference in the base of the tax."

Wholly apart from the fact that this court has held that any such incidental inequalities of taxation which may grow out of inequalities in business conditions and activities do not affect the validity of the statute or the substantial uniformity of the rule of taxation secured by the "equal protection of the

laws" clause of the Fourteenth Amendment, of which the provision in Section 3 of the Philippine Organic Act, that "the rule of taxation in said islands shall be uniform", is substantially but a paraphrase securing the same end as that of the Fourteenth Amendment "that no greater burdens should be laid upon one than are laid upon others in the same calling and condition" (*Bells Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 238; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 621–622; *Stebbins* v. *Riley*, 268 U. S. 137, 142–143; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351),—**petitioner's above quoted claim in this case that this decision of the Supreme Court of the Philippine Islands violates the uniformity clause of the Jones Law is wholly based upon petitioner's entire misapprehension of the Insular Court's decision.**

As already pointed out, petitioner states this claim simply as a corollary to its principal proposition in its second "Reason" above quoted, wherein it contends that the Insular Supreme Court in this case

> "*has held* that the words '*sources within the Philippine Islands*', as applied to foreign corporations with branches in the Philippine Islands, *embraces income received from profits on sales made by such corporations of Philippine products in the United States of America.*"

No other basis is anywhere suggested by petitioner, either in its petition or in its supporting brief (*cf.* Point "V," pp. 33–34, of its brief), for this claim of violation of the uniformity clause of the Jones Law, then as a corollary to its principal proposition, above quoted, that the effect of the Insular Court's decision is to hold that the words "sources within the Philippine Islands" contained in Section 10 of the Philippine Income Tax Law "embraces income received from profits on sales made by such corporations" in the United States. There is no other possible basis for petitioner's claim of violation of the uniformity clause.

BUT PETITIONER'S PRINCIPAL PROPOSITION IS BASED ON A COMPLETE MISAPPREHENSION OF THE DECISION OF THE INSULAR SUPREME COURT. *That court* NOWHERE HOLDS *that, as stated by petitioner, the phrase "sources within the Philippine Islands",*

as applied to foreign corporations with branches in the Philippine Islands, embraces income from profits on sales made in the United States.

It says nothing of the kind in its opinion (R. 26–33); nor is any such result to be implied either from its opinion or from its judgment in this case.

Quite to the contrary, that court, in its opinion, expressly recognizes (R. 30) the correctness of the rule stated in the opinion of Acting Attorney General Frierson (32 Ops. Atty's. Gen., 336), relied upon by the petitioner here (Petitioner's Brief, pp. 21–22) as well as in the court below, *that the place of sale is determinative of the "source" of the income*, within the meaning of the Philippine statute here in question, as well as within the meaning of the similar language used in the federal statute; and the Insular Court, *expressly "assuming that to be the law"* (R. 30), simply held that in point of fact, in the case here at bar, under the stipulation of facts before the court, these particular sales were actually made in the Philippine Islands, and not in the United States; and that, therefore, under the rule contended for by the petitioner itself, the resulting income was taxable in the Philippine Islands where the sales were actually made.

There is no possible substantial basis for the claim that the Insular Court has put any construction upon the Philippine statute which would make it in any way violative of the uniformity clause of the Jones Law.

And no other federal question being suggested, and the amount here involved being less than $25,000, this court is without jurisdiction of this case under Section 7 of the Act of February 13, 1925.

POINT II

EVEN IF THIS COURT HAD JURISDICTION, IT WOULD NOT DISTURB THE TERRITORIAL SUPREME COURT'S DETERMINATION THAT THE SALES HERE IN QUESTION WERE IN POINT OF FACT ACTUALLY CONSUMMATED, "MADE", IN THE PHILIPPINE ISLANDS AND NOT IN THE UNITED STATES.

A.—The territorial supreme court, construing the language used in the "Agreed Statement of Facts" before it in this

case (R. 8–12, and see "Statement of the Case", *ante*, p. 4) to the effect that the sugar, tobacco, and other commodities here in question,—produced or purchased in the Philippine Islands by petitioner's "Philippine branch",—were "sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof by the plaintiff's Philippine branch", *held* (R. 29–32) that that language meant that (R. 29),

> "no sale was actually consummated until after it was ratified and approved by the local branch" (the Tobacco Company's local branch in the Philippine Islands);

and that (R. 32),

> "In the instant case, the record is conclusive that all of the sources of plaintiff's income in question had their origin in or were derived from its branch office in the Philippine Islands, and that all of the sales in question were made through its branch office, and that no sale was actually consummated until such time as it was approved by the branch office both as to terms and conditions."

That is to say, that the sales were actually made within the Philippine Islands and not in the United States, in accordance with the generally recognized rule that "where an order is given for the purchase of goods to an agent who has not authority to sell, but which is forwarded to his principal for approval, the contract is deemed to be made at the place of approval" (35 Cyc., "Sales", p. 94, Note 80, and cases there cited).

B. That finding of the Philippine Supreme Court that, upon a true interpretation of the "Agreed Statement of Facts" upon which this case was tried, the sales here in question were really consummated,—that is, "made",— in the Philippine Islands, and not in the United States, and that, therefore, the income therefrom was "derived from sources within the Philippine Islands" within the meaning of the local income tax law, Philippine Act No. 2833, as amended by Act No. 2926, was *a finding of ultimate facts* by that court, *or else a finding on a mixed question of fact and of local law and of the interpretation of a local statute;* and, not appearing to be "clearly erroneous", it will not be disturbed by this court.

That finding involves no element of federal law,—nothing except a finding of ultimate facts based upon the territorial supreme court's interpretation of the stipulation or "Agreed Statement of Facts" before it in this case, in the light of general principles of law as locally applied and interpreted by that court. It is wholly within the class of cases wherein the determination of the local territorial supreme court, based upon its interpretation and application of local law, and/or its findings of fact, will not be disturbed by this court, unless "clearly erroneous". *Ling Su Fan* v. *United States*, 218 U. S. 302, 308; *Harrison* v. *Perea*, 168 U. S. 311, 323; *Cardona* v. *Quiñones*, 240 U. S. 83, 88; *Ibanez* v. *Hong Kong, etc. Banking Corporation*, 246 U. S. 621, 627; *Alzua* v. *Johnson*, 231 U. S. 106, 110; *Flemister* v. *United States*, 207 U. S. 372, 375; *Dowdell* v. *United States*, 221 U. S. 325, 327–329.

The Insular Supreme Court's determination in this case, that these sales here in question were actually consummated, "made", within the Philippine Islands by plaintiff's Philippine branch at Manila, is not "clearly erroneous". On the contrary, it is perfectly reasonable and right, and is fully supported by the entire record.

POINT III

IN ANY EVENT, THE INSULAR SUPREME COURT'S FINDING THAT THE SALES WERE CONSUMMATED,—THAT IS TO SAY, "MADE",—IN THE PHILIPPINE ISLANDS, AND NOT IN THE UNITED STATES, WAS RIGHT.

Even if the correctness of the territorial supreme court's determination of that question were to be treated as open for examination *de novo* in this court, it is in accordance with the generally accepted principles of law applicable to contracts of sale; is clearly right; and should be sustained.

The generally accepted rule is, as stated by the editors of the "Cyclopedia of Law and Procedure", quoted, *ante*, Point II, p. 11, that, "*where an order is given for the purchase of goods to an agent who has not authority to sell, but which is forwarded to his principal for approval, the contract is deemed to be*

made at the place of approval" (35 Cyc., *supra*, "Sales", p. 94, Note 80).

In a liquor case before the United States Circuit Court for the Northern District of Iowa, where the sole question involved was of the place where the sale was made, the liquor having been purchased by residents of Dubuque, Iowa, from a wholesale firm in Chicago which was suing the purchasers for the purchase price, the defense being that the contract of sale was prohibited by the laws of Iowa, and therefore void, so that the purchase price was uncollectible, and it was conceded that, if the sale was to be deemed as made in Iowa, then it was void and the plaintiffs could not recover, whereas, on the other hand, if it was to be deemed as made at Chicago in Illinois, then it was perfectly valid and the plaintiffs were entitled to recover the purchase price, it appeared that the sales were made upon orders given by the defendants at Dubuque to an agent of the plaintiffs, the vendors. The court instructed the jury that if the agent, Connors, had authority to make a completed contract of sale, and did in fact make a contract at Dubuque, then the sale was made in Iowa, and was void under the Iowa statute; but that if, on the other hand, the agent Connors was without authority to enter into a binding contract, and that the orders when received in Chicago by the plaintiffs were subject to their approval or disapproval and they were under no obligation to fill them unless approved, then the sale was to be deemed a sale made in Illinois. The jury, having found a verdict for the plaintiffs, the court (O. P. SHIRAS, J.) overruled defendants' motion for a new trial and gave the plaintiffs a judgment on the verdict, saying:

> "The point of inquiry is, when and where was the contract of sale entered into? 'A contract is an agreement in which a party understakes to do, or not to do, a particular thing.' *Sturges v. Crowninshield*, 4 Wheat. 197. A contract does not become such until the minds of the contracting parties meet. When and where did the plaintiffs agree to sell the liquors in question to the defendants? Connors certainly did not make or complete a contract with defendants, for it is admitted, in the aspect of the case now under consideration, that he had no authority to make a contract or to bind plaintiffs. The utmost that

can be said is that he, not having authority to make a contract, undertook to agree upon the terms of sale, which did not, however, bind plaintiffs until they had had given their assent thereto. The contract was made when plaintiffs, by approval, acceptance, or ratification, assented thereto. Then, in fact, for the first time, did the minds of the contracting parties meet, and thereby render binding and obligatory that which before was, in effect, only a proposition for a contract. The rule is well settled that where orders are given for the purchase of goods to an agent who has not authority to sell, but which are forwarded to the principal for his approval, the contract is deemed to be made at the place of approval."

Shuenfeldt v. *Junkermann*, 20 Fed. 357, 359-360.

And so this court has held that a contract between an individual resident of Michigan and an Ohio corporation, signed in Michigan both by the individual party and also on behalf of the corporation by its local agent there, but with a stipulation that it should not be valid unless approved by the corporation's home office at Akron, Ohio, and afterwards actually approved there, was not "made" in Michigan, but was to be considered as "made" in Akron, Ohio, upon its approval there, when it "then and there, for the first time, became a valid and binding contract between the parties"; and that it could not be considered as "made" "at any earlier time, or other place."

Holder v. *Aultman*, 169 U. S. 81, 91.

And it is immaterial that the goods may have actually been here in the United States, in the hands of the plaintiff's "agency" here, before the sales were made, since the consummation of the contract of sale, by its approval by the plaintiff's Philippine branch in Manila, operated as a constructive delivery of the title, and completed the transaction.

Thus, for instance, in another liquor case where New York importers and wholesalers imported goods through the port of New Orleans and left them there in warehouse at New Orleans and sold them on orders taken by local agents, accepted or approved by the firm's head office in New York, and the question was, for the purposes of the payment of the federal license tax, whether the sales were to be treated as made at New York where the orders were accepted or approved, or at

New Orleans where the goods were in storage in the warehouse from which they were afterwards delivered, it was *held* by the Circuit Court of Appeals for the Fifth Circuit that the sales were to be treated as made in New York; and, hence, the license tax having been paid there, that it was unnecessary to pay the tax in New Orleans; and that the fact that the goods had been in storage in New Orleans, and were delivered from that place, was immaterial; the court saying:

> "The government does not contend that the liquors were sold, or offered for sale, by plaintiffs in error at New Orleans. Its contention is that their acceptance of orders sent to them at New York, and the delivery or shipment of the goods there sold, by the public warehouseman at New Orleans, constitutes in law a sale at the latter place. Under the common law, a sale is a contract for the transfer of property from one person to another for valuable consideration, and three things are requisite to its validity, viz., the thing sold which is the object of the contract, the price, and the consent of the contracting parties. * * * Where a sale results by the acceptance of an order, the sale is made where the order is accepted. *Shuenfeldt* v. *Junkermann* (C. C.) 20 Fed. 357.
>
> "Benjamin on Sales, speaking of the formation and completion of sales (page 1), says:
>
> 'By the common law, a "sale" may be defined as a transfer of the absolute property in a thing for a price in money. * * * All that was required to give validity to a sale of personal property, whatever may have been the amount of value, was the mutual assent of the parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed by mutual assent that one should transfer the absolute property of the thing to the other for a money price, the contract was completely proven and binding on both parties. If, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed, in the common law, "a bargain and sale of goods."'
>
> "A primary, material, and essential result which, by operation of law, flows from a completed sale, is that the title to the property in the thing sold passes, or has passed, out of the seller into the purchaser. It will be seen, from the authorities, that delivery is not an essential element in or to the completion of a sale of personal property. De-

livery, in its legal sense, may denote a transfer of title to the thing sold, or it may mean a transfer of possession. In some cases between the parties, as well as between them and other persons affected by a completed 'contract of bargain and sale of goods,' it may become necessary to consider whether the reciprocal obligations imposed by the terms of the sale, on the seller and buyer, have been performed. In such cases, delivery, whether constructive or actual, may be an evidence of performance. In the case we are considering, there is no question at issue of performance by either the seller or buyer of the liquors stored at New Orleans. It does not seem necessary to discuss the incident of delivery, or its effect on the sales made at New York by the plaintiffs in error. • • • •

"The facts in the record show clearly enough that there was a constructive delivery made at New York to the purchasers of such goods as were, at the time of the completed sale, in the warehouse at New Orleans. • • • •

"Presumably, so far as the evidence discloses the transaction between the seller and buyer, a transfer by operation of law of the title in the property sold was made by plaintiffs in error to the purchaser wherever he may have been. It may be, too, that the delivery order, which seems to have been transmitted to the warehouseman at New Orleans, designated and made certain the quantity and quality of the goods sold by plaintiffs in error at New York. If such should prove to be the case, it may follow, presumably by operation of law, that delivery, constructively, was thereby made at New York. Under the legal import of such orders, and a fair view of the facts, it may follow, too, that the warehouseman, as soon as the orders were transmitted from the seller to the buyer, ceased to be the bailee of the commercial house at New York, and became a bailee of the purchaser."

De Bary v. *Sauer*, 101 Fed. 425, 427–429.

Mutatis mutandis, that is this case. These sales were "made" in Manila.

CONCLUSION

Petitioner fails to state the specific grounds on which it invokes the jurisdiction of the court in this case, and it is submitted that nothing appears in this record to support the jurisdiction of this court to grant the writ. And even if this

court had jurisdiction, no reason is here presented for the exercise of its extraordinary jurisdiction by certiorari; no substantial federal question is presented; no question of public importance or general interest is raised; no other cases are dependent on the outcome of this suit, which turns simply upon the interpretation by the Insular Supreme Court of the "Agreed Statement of Facts" in this particular case, holding that in this specific case, upon the agreed facts before it, these sales were actually made in the Philippine Islands, and not in the United States. It is submitted that the petition should be dismissed for want of jurisdiction under Section 7 of the Act of February 13, 1925. And that, in any event, certiorari should be denied.

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SUPREME COURT OF THE UNITED STATES.

No. 335.—October Term, 1928.

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Compañia General de Tabacos de Filipinas, Petitioner,
vs.
Collector of Internal Revenue.

On Writ of Certiorari to the Supreme Court of the Philippine Islands.

[April 8, 1929.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, a Spanish corporation, brought suit in the Court of First Instance of the City of Manila, to recover income taxes alleged to have been illegally exacted. Judgment for petitioner was reversed by the Supreme Court of the Philippine Islands. Vol. XXVI, Philippine Official Gazette, No. 65, May 31, 1928, p. 1712. This Court granted certiorari October 22, 1928, — U. S. —, under § 7 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940.

The tax was assessed under § 10 of the Philippine Income Tax Law of March 7, 1919, Act 2833, 14 Pub. Laws, P. I. 221, as amended by Act 2926, March 20, 1920, 15 Pub. Laws, P. I. 260, which imposed a tax of 3% annually " . . . upon the total net income received in the preceding calendar year from all sources within the Philippine Islands by every corporation . . . organized . . . under the laws of any foreign country . . ." The case was tried on an agreed statement of facts and the question presented is whether the profit or income, upon which the tax now in question was assessed, was received from "sources within the Philippine Islands" within the meaning of the statute.

The stipulated facts are: that petitioner, a foreign corporation, was licensed to do business in the Philippine Islands and there maintained its principal office and did most of its business; that it owned in the Islands various sugar and oil mills and tobacco factories and was there engaged in buying, selling and exporting these products; that acting through its Philippine branch, peti-

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tioner from time to time during 1922 exported from the Philippine Islands to the United States tobacco, sugar, copra and cocoanut oil, produced, manufactured or purchased by it in the Philippine Islands; that this merchandise " . . . was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions . . . the plaintiff made a profit . . . " which was " . . . accounted for by the plaintiff on its books of account kept in the Philippine Islands as earnings made by and accruing to the Philippine branch . . . " It was this net profit on which the tax was levied.

Petitioner insists that, as the stipulation recites that the merchandise was "sold" in the United States, the profit derived from the sales was not from sources within the Philippine Islands and was, therefore, not subject to the tax. Section 10 of the Philippine Act is substantially similar to the corresponding section of the United States Revenue Act of September 8, 1916, c. 463, § 10, 39 Stat. 756, 765, and, in support of its position, petitioner cites opinions of the Attorney General of the United States ruling that a profit made by a foreign corporation from the sale, in other countries, of merchandise produced or purchased in the United States was not taxable income "from sources within the United States" under the latter Act, and the similar provisions of the Revenue Acts of 1917, October 3, 1917, c. 63, § 1206, 40 Stat. 300, 333, and of 1918, February 24, 1919, c. 18, § 233, 40 Stat. 1057, 1077. See opinions of the Attorney General of January 21, 1924, 34 Ops. A. G. 93; and of November 3, 1920, 32 Ops. A. G. 336. These opinions were accepted and applied by Treasury Decision 3576, Cum. Bull. III-1-211, and Treasury Decision 3111, 4 Cum. Bull. 280. See also *Birkin* v. *Commissioner*, 5 B. T. A. 402; *Appeal of Yokohama Kyi Ito Kwaisha, Ltd.*, 5 B. T. A. 1248; *Bullwiller* v. *Commissioner*, 11 B. T. A. 841; *R. J. Dorn & Co.* v. *Commissioner*, 12 B. T. A. 1102; O. D. 651, 3 Cum. Bull. 265.

While the stipulation states that the merchandise was "sold" in the United States by petitioner's agency there, this statement cannot be taken without qualification; it must be read with the limitation immediately following that such sales were

"subject to confirmation and absolute control as to price and other terms and conditions" by petitioner's Philippine branch. It does not appear whether the confirmation was, in each case, given by the Philippine branch direct to the buyer or was otherwise the final act consummating the sales within the Philippine Islands, or whether, as the trial court and petitioner seem to have assumed, it was a mere approval or ratification of the negotiations had by petitioner's American agent, and authority to him to confirm or otherwise complete the sales in the United States. Certainly, if the former, the final acts of petitioner making effective the sales, which were the source of the profit, took place in the Philippine Islands as an incident to and part of its business conducted there. See *Holder* v. *Aultman*, 169 U. S. 81, 89; *Lloyd Thomas Co.* v. *Grosvenor*, 144 Tenn. 349; *Charles A. Stickney Co.* v. *Lynch*, 163 Wis. 353; *Shuenfeldt* v. *Junkermann*, 20 Fed. 357.

If, in fact, the sales were thus made in the Philippine Islands, we think it unimportant whether the merchandise sold was exported before or after its sale; it could not be seriously contended, and indeed petitioner does not contend, that a profit derived from such transactions would not be subject to the tax. For, in such a case, the entire transaction resulting in a profit, with the exception of the negotiations in the United States preceding the sale, would have taken place in the Philippines. Instead, petitioner asks us to construe the stipulation so as to bring it within the ruling of the Attorney General applied to a state of facts where every act effecting the sale took place outside the taxing jurisdiction. The ambiguous phraseology of the stipulation failing to disclose precisely how the business was done, we may not speculate as to its actual character. See *Cochran* v. *United States*, 254 U. S. 387, 393.

The burden is on him who seeks the recovery of a tax already paid to establish those facts which show its invalidity. *United States* v. *Anderson*, 269 U. S. 422, 428; *Fidelity Title Co.* v. *United States*, 259 U. S. 304, 306. Further, in the absence of a clear showing of error, this Court should be slow to reverse the judgment of a territorial court on questions of fact or of local law. *Villanueva* v. *Villanueva*, 239 U. S. 293, 298; *Fox* v. *Haarstick*, 156 U. S. 674, 679. For the reason indicated, the stipulation here does not sustain the burden resting on petitioner.

We need not consider petitioner's contention that the taxing act, when applied to sales outside the Philippine Islands, conflicts with the "equal protection" clause of the Philippine Organic Law. This argument presupposes that the sales were so made, an assumption which, as already stated, we cannot make.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.